Development and Regulation Committee

10:30	Friday, 25 January 2013	Committee Room 1, County Hall

Quorum: 3

Membership:

Councillor Nigel Edey	Chairman
Councillor Bill Dick	Vice-Chairman
Councillor R Boyce	
Councillor M Garnett	
Councillor T Higgins	
Councillor S Hillier	
Councillor G McEwen	
Councillor M Miller	
Councillor D Morris	
Councillor I Pummell	
Councillor J Reeves	

For information about the meeting please ask for:
Matthew Waldie, Committee Officer
Telephone: 01245 430565
Email: matthew.waldie@essex.gov.uk

Essex County Council

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Part 1

(During consideration of these items the meeting is likely to be open to the press and public)

		Pages
1	**Apologies and Substitution Notices** The Committee Officer to report receipt (if any)	
2	**Minutes** To approve as a correct record the Minutes of the Development and Regulation Committee held on Friday 23 November 2012.	**7 - 16**
3	**Declarations of Interest** To note any declarations of interest to be made by Members	
4	**Identification of Items Involving Public Speaking** To note where members of the public are speaking on an agenda item. These items may be brought forward on the agenda.	
5	**Minerals and Waste**	
5a	**Winsford Way** Change of use of land to a Waste Transfer Station to include the erection of a building for the transfer/bulking of municipal waste, together with ancillary development including dual weighbridge, weighbridge kiosk, office and staff welfare building, fire water holding tanks and pumphouse, underground surface water drainage tanks and pipework, package sewage treatment plant and pipework, vehicle wash system, staff car and cycle parking, vehicle hardstanding, fencing, landscaping, formation of accesses to site and associated works. Location: Land on the west side of Winsford Way, Chelmsford, CM2 5AA. Ref: ESS/65/12/CHL **DR0113**	**17 - 58**
5b	**Bellhouse gas flare** The relocation of a 2000 SCMH flare within the Bellhouse Landfill Site for a temporary period not exceeding 9 months. Bellhouse Landfill, Warren Lane, Stanway, Colchester, CO3 0NN. Ref: ESS/62/12/COL **DR0213**	**59 - 70**

6	**Village Green**	
6a	**Pound Lane** Application to register land known as Pound Lane Recreation Ground, Pound Lane, Laindon, Basildon as a town or village green. **DR0313**	**71 - 124**
7	**Information Items**	
7a	**Enforcement update (Oct-Dec 2012)** To update members of enforcement matters for the period 01 October to 31 December 2012 (Quarterly Period 3). **DR0413**	**125 - 128**
7b	**Statistics January 2013** To update Members with relevant information on planning applications, appeals and enforcements, as at the end of the previous month, plus other background information as may be requested by Committee. **DR0513**	**129 - 132**
8	**Date of Next Meeting** To note that the next meeting will be held on Friday 22 February 2013.	
9	**Urgent Business** To consider any matter which in the opinion of the Chairman should be considered in public by reason of special circumstances (to be specified) as a matter of urgency.	

Exempt Items

(During consideration of these items the meeting is not likely to be open to the press and public)

To consider whether the press and public should be excluded from the meeting during consideration of an agenda item on the grounds that it involves the likely disclosure of exempt information as specified in Part I of Schedule 12A of the Local Government Act 1972 or it being confidential for the purposes of Section 100A(2) of that Act.

In each case, Members are asked to decide whether, in all the circumstances, the public interest in maintaining the exemption (and discussing the matter in private) outweighs the public interest in disclosing the information.

10 **Urgent Exempt Business**

To consider in private any other matter which in the opinion of the Chairman should be considered by reason of special circumstances (to be specified) as a matter of urgency.

All letters of representation referred to in the reports attached to this agenda are available for inspection. Anyone wishing to see these documents should contact the Officer identified on the front page of the report prior to the date of the meeting.

MINUTES OF A MEETING OF THE DEVELOPMENT AND REGULATION COMMITTEE HELD AT COUNTY HALL, CHELMSFORD ON 23 NOVEMBER 2012

Present

Cllr N Edey (Chairman)	Cllr G McEwen
Cllr W Dick	Cllr M Miller
Cllr M Garnett	Cllr D Morris
Cllr I Grundy	Cllr I Pummell
Cllr M Mackrory	Cllr J Reeves

1. Apologies and Substitution Notices

Apologies were received from Cllrs R Boyce (substituted by Cllr I Grundy), T Higgins (substituted by Cllr M Mackrory), S Hillier and R Pearson (substituted by Cllr C Riley).

2. Minutes

The Minutes and Addendum of the Committee held on 26 October 2012 were agreed and signed by the Chairman.

3. Matters Arising

There were no matters arising.

4. Declarations of Interest

Councillor Mackrory declared a non-pecuniary interest in Agenda Item 5a.

Councillor Pummell declared a non-pecuniary interest in Agenda Item 7a.

Councillor Morris declared a non-pecuniary interest in Agenda Items 7a and 7b.

5. Identification of Items Involving Public Speaking

There were none identified.

Minerals and Waste

6. Park Farm

The Committee considered report DR/41/12 by the Head of Environmental Planning.

The Members of the Committee noted the contents of the Addendum attached to these minutes and the changes to heads of terms of the legal agreements and the conditions.

The Committee was advised that the proposal was for the winning and working of sand and gravel and associated dry screen processing plant, temporary storage

of minerals and soils and associated infrastructure; in addition backfilling of the void with soils and overburden arising from the development of mixed uses on land adjacent to the mineral working.

Policies relevant to the application were detailed in the report.

The Committee noted the contents of the Environmental Impact Assessment attached as an appendix to the report.

Details of Consultation and Representations received were set out in the report.

The Committee noted the key issues that were:

- Need & Principle of the Development
- Relationship With Mixed Use Development And Legal Agreements
- Landscape and visual Impact
- Impact on Residential & Local Amenity – air quality, dust and noise
- Ground & Surface Water
- Ecology
- Historic Environment
- Traffic and Highways
- Agriculture and Soils
- Public Rights Of Way
- Phasing, Reinstatement/Restoration & Timescale

A number of concerns were raised by Members.

In response to questions raised, Members were informed that:

- The movement of plant beneath powerlines should not present difficulties
- The flood risk assessment had not revealed any potential flooding problems
- The spine road would not be constructed until the final phase of the development (scheduled completion in 2022).

The resolution was moved, seconded and unanimously agreed and

Resolved:

That planning permission be granted subject to the following:

i) The prior completion, within 12 months, of Legal Agreements under the Planning Acts to secure obligations or such alternative forms as may be agreed by the Head of Environmental Planning and the County Council's Legal Officer, following further discussions with the applicant to cover the following matters:

- The scheme of obligations relating to the application site as currently set out within the existing s52 legal agreement associated with planning permissions CHL/1890/87 and CHL/1019/87 will require to be altered and/or restructured or a new legal agreement agreed to take account of the proposals.

- Not to commence implementation of the mineral/backfill development until lawful commencement of GBP development (CCC application ref: 09/01314/EIA).

- Prior to commencement of the mineral/backfill development to obtain approval from ECC of the habitat management plan as required by CCC application reference ref: 09/01314/EIA, subject to Chelmsford City Council confirming they intend to approve the same habitat management plan.

- Prior to commencement of the mineral development to obtain approval from ECC of the construction and environmental management plan as required by CCC application ref: 09/01314/EIA, subject to Chelmsford City Council being in a position confirming they intend to approve the same construction and environmental management plan.

- Prior to commencement of dewatering of the application site to obtain approval from ECC of the drainage management system (in particular with respect to the settlement pond and discharge of water resulting from dewatering and surface water from the application site) as required by CCC application Ref. 09/01314/EIA, subject to Chelmsford City Council confirming they intend to approve the same drainage management system.

- Groundwater monitoring outside the application site as described within the application and Environmental Statement

- Scheme of mitigation to be submitted should the water level in ponds outside the site drop significantly due to activities associated with the mineral/backfill development.

- Requirement for applicant to serve Unilateral Undertakings (UU) (the wording of which to be agreed in advance with MPA) on licensed abstractors. The UUs obligating to put licensed abstractors on mains water supply should there be significant detrimental impact upon water abstractions resulting from the mineral/backfill development.

- Early implementation of planting on the north and west boundary of New Hall School, as proposed by planning application CCC Ref: 09/01314/EIA

- Access/egress to and from the public highway for vehicles associated with the mineral/backfill development only at locations as approved under planning application CCC Ref: 09/01314/EIA

ii) And conditions relating to the following matters;

- COMM1 Commencement within 5 years
- COM3 Compliance with Submitted Details
- PROD 1 Export restriction - no greater rate than 325,000 tonnes per annum

- CESS5 Cessation of Mineral Development within 4 years, cessation of landfilling and restoration within 8 years except for restoration of boundary with Bulls Lodge Quarry extraction
- CESS3 Removal of Ancillary Development
- CESS7 Revised Restoration in Event of Suspension of Operations
- HOUR2 Hours of working (Mineral Specific)
  07:00 to 18:30 hours Monday to Friday
  07:00 to 13:00 hours Saturdays
  and at no other times or on Sundays, Bank or Public Holidays.
- The schedule of work and timescales shall be carried out to accommodate the infrastructure delivery plan set out in the proposal of application ref. 09/01314/EIA
- South and east facing slopes of stores of overburden and subsoil shall be no greater than 1:3 and shall be topsoiled and seeded in first available planting season and subject to a programme of maintenance
- LGHT1 Fixed Lighting Restriction
- ECO3 Protection of Breeding Birds
- Submission of method statement with respect to removal of hedgerow
- Scheme of mitigation should ponds within the site dry due to mineral operations
- 10m standoff to all retained hedgerow and hedgerow trees
- NSE1 Noise Limits
- NSE2 Temporary Noisy Operations
- NSE3 Monitoring Noise Levels
- NSE5 White Noise Alarms
- NSE6 Silencing of Plant and Machinery
- HIGH3 Surfacing/Maintenance of Haul Road
- HIGH2 Vehicular Access
- DUST1 Dust Suppression Scheme – including source of water for dust suppression
- POLL6 Groundwater Monitoring
- Flood risk mitigation in accordance with FRA Dec 2011
- Details of method of soil stripping and placement
- LS4 Stripping of Top and Subsoil
- LS5 Maintenance of Bunds
- LS8 Soil Handled in a Dry and Friable Condition
- LS10 Notification of Commencement of Soil Stripping
- LS12 Topsoil and Subsoil Storage
- ARC1 Advance Archaeological Investigation
- No material other than overburden, subsoils and excavation waste (except topsoils) shall be disposed in the void
- POLL 4 Fuel/Chemical Storage
- POLL 8 Prevention of Plant and Machinery Pollution
- Scheme for removal of suspended solids from surface water run-off
- RES4 Final Landform
- Interim restoration scheme to rough grassland for phases where infilling complete, but redevelopment under GBP development not planned within 6 months

- Submission of restoration details for northern boundary area as indicated hatched on ES4.16 ensuring levels tie in with those permitted as part of CHL/1890/87 or any subsequent amendment
- Nature and use of infilling materials in accordance with report by URS Mineral Extraction and Backfill dated May 2012 and ensure the made up ground over which the Radial Distributor Road associated with application Ref 09/01314/EIA being dealt with by CCC is backfilled with appropriate material and compacted to finished levels to support the new RDR design requirements.
- MIN1 No Importation
- WAST6 No Crushing of Stone
- GPDO2 Removal of PD Rights
- Scheme of mitigation should ponds inside the site dry due to mineral operations
- No extraction or infilling at the site 4 years after commencement until the submission and approval of a reassessment of the impact of the proposals on ecology and the water environment.
- Submission of details of use of surplus topsoils

County Council Development

7. Castle View School

The Committee considered report DR/42/12 by the Head of Environmental Planning.

The Committee was advised that the school was exploring options with regard to reducing the height of the cage. If this were to prove unsuccessful, it would then look at an alternative site. In either case, it was likely to come back to the Committee early in 2013.

The Committee noted the position.

Village Green

8. Wethersfield Way, Wickford

The Committee considered report DR/43/12 by the County Solicitor.

Members considered an application made by Mrs Tristan Marriott to register land known as “the Green”, adjacent to Wethersfield Way, Wickford as a town or village green pursuant to Section 15(2) of the Commons Act 2006.

The Committee noted:

- A non-statutory public local inquiry has been held and the Inspector’s report was attached as Appendix 1 in the agenda for information.
- No further representations had been received, either from the applicant or the objector following the Inspector’s Report
- Brief comments made by Councillor Iris Pummell, local Member for Wickford Crouch.

Following the presentation, which included photographs and detailed maps of the

site, the recommendation to accept the application was moved, seconded and unanimously agreed and

Resolved:

1. The boundary of the identified neighbourhood on Appendix 2 in DR/43/12 is accepted as the neighbourhood and that Basildon Borough, formerly Basildon District, is the locality area in relation to the application;

2. The inspector's analysis of the evidence in support of the application is accepted and his recommendation that the application made by Mrs Marriott received in May 2011 is accepted for the reasons set out in the inspector's report and in summary in report DR/43/12 and the land applied for is added to the Register of Town and Village Greens.

Councillor Morris left the meeting at 11.20 am

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9. Kent View Road, Vange

The Committee considered report DR/44/12 by the County Solicitor.

Members considered an application made by Mr Neil Hart to register land known as Kent View Recreation Ground, Kent View Road, Vange, as a town or village green pursuant to Section 15(2) of the Commons Act 2006.

The Committee noted:

- A non-statutory public local inquiry has been held and the Inspector's report was attached as Appendix 1 in the agenda for information.
- Following the Inspector's Report, the applicant has expressed the intention to approach Basildon Borough Council, as landowner, to see if it might consider extending the area recommended to be registered as village green.
- Basildon BC has made no further representations, following the Inspector's Report.

Following the presentation, which included photographs and detailed maps of the site, the recommendation to accept the application was moved, seconded and unanimously agreed and

Resolved:

1. That, with the exception of the cross hatched area on the map at the front of report DR/44/12, the application is rejected as the land has a legal status which defeats the acquisition of village green rights over it.
2. The part of the application land shown with cross hatching on the map at the front of report DR/44/12 is registered as town or village green.

Enforcement Update

10. Weald Place Farm

The Committee considered report DR/45/12, by the Head of Environmental Planning.

The Committee **NOTED** the report.

Appeal Update

11. Coronation Nursery

The Committee considered report DR/46/12, by the Head of Environmental Planning.

The Committee **NOTED** the report.

12. Maple River

The Committee considered report DR/47/12, by the Head of Environmental Planning.

The Committee **NOTED** the report.

Information Items

13. Statistics

The Committee considered report DR/48/12, Applications, Enforcement and Appeals Statistics, as at end October 2012, by the Head of Environmental Planning.

The Committee **NOTED** the report.

14. Date and Time of Next Meeting

The Committee noted that the next meeting was scheduled for Friday 14 December 2012 at 10.30am in Committee Room 1. However, given the lack of agenda items at present, it was possible that no meeting would be necessary.

[Position confirmed subsequent to meeting; so the December meeting was cancelled. Next meeting: Friday 25 January 2012]

Before closing the meeting, the Chairman informed Members that Roy Leavitt, Head of Environmental Planning, will be retiring in December, so this will be his last meeting. The Committee thanked him for his long service for the County and wished him well for the future.

There being no further business the meeting closed at 11.40am.

ADDENDUM FOR THE MEETING OF DEVELOPMENT & REGULATION COMMITTEE 23 NOVEMBER 2012

Item 5(a) Land to the south of Park Farm, Springfield, Chelmsford. ESS/21/12/CHL

PAGE 25 (C) LANDSCAPE AND VISUAL IMPACT

Last paragraph of section C delete and replace with

It is considered subject to the slackening of outwards faces of the bunds and grass seeding of the bunds and early planting of vegetation as part of the GBP development, as described above, the development would not result in an adverse landscape or visual impact. It is therefore considered the proposals would be in accordance with policies MLP13, W10E, ENV2, CP9, CP13, DC4, DC18 and DC20. It is considered subject to the suggested conditions and obligations there would be no significant adverse landscape and visual impact and the proposals comply with NPPF objectives with respect to its social and environmental role, supporting healthy communities and protecting the natural and historical environment.

PAGE 23 - (B) RELATIONSHIP WITH MIXED USE DEVELOPMENT AND LEGAL AGREEMENTS

4th paragraph 3rd & 4th sentence combine to read.
Subject to planning permission being granted, there would need to be a legal agreement to address…

PAGE 34 – RECOMMENDED

Point (i) delete and replace with

The prior completion, within 12 months, of Legal Agreements under the Planning Acts to secure obligations or such alternative forms as may be agreed by the Head of Environmental Planning and the County Council's Legal Officer, following further discussions with the applicant to cover the following matters:

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PAGE 34 Point (ii) Conditions

First bullet point delete and replace with

COMM1 Commencement within 5 years

AGENDA ITEM .....5a.....

DR/01/13

committee DEVELOPMENT & REGULATION

date 25 January 2013

MINERALS AND WASTE DEVELOPMENT

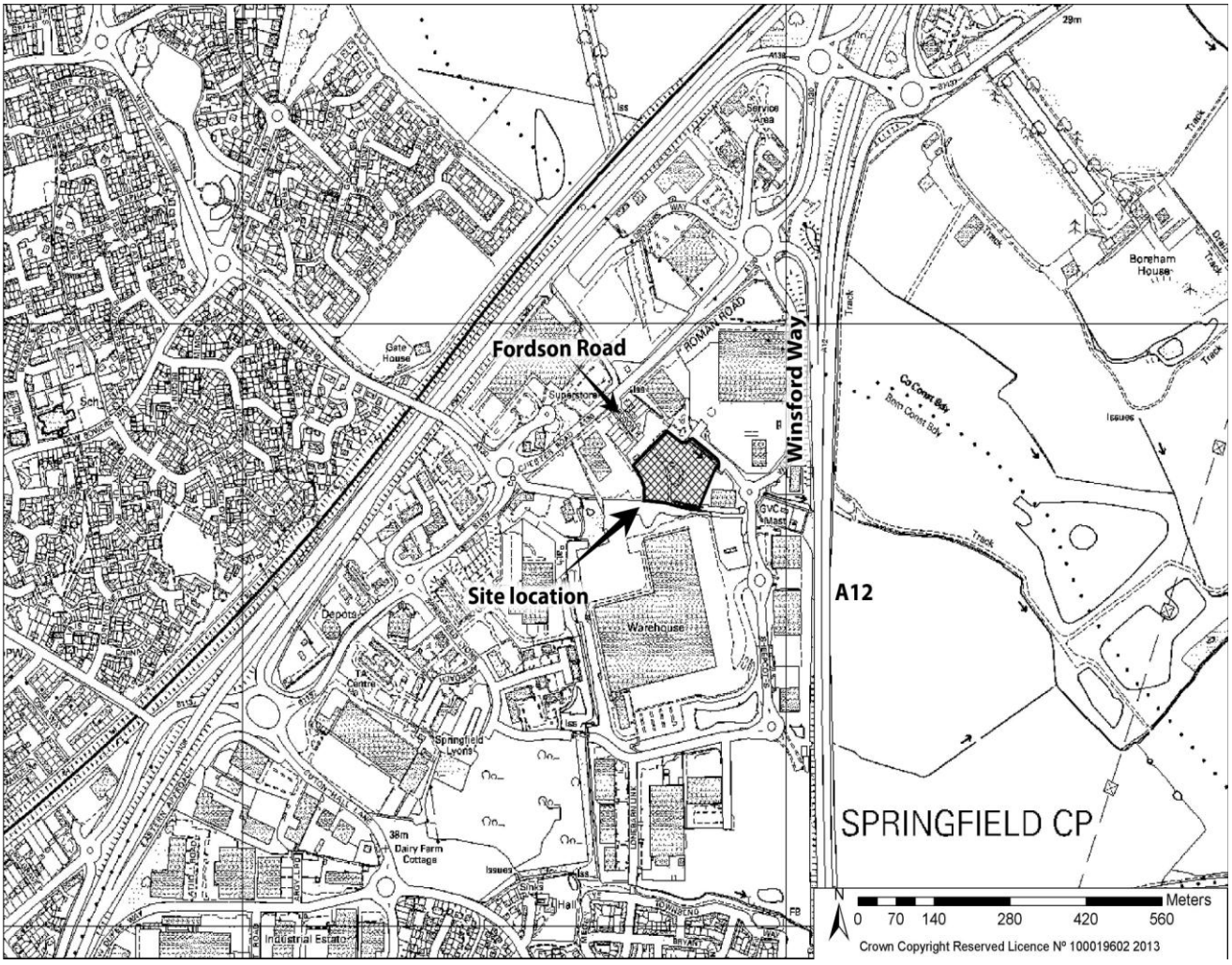
Proposal: **Change of use of land to a Waste Transfer Station to include the erection of a building for the transfer/bulking of municipal waste, together with ancillary development including dual weighbridge, weighbridge kiosk, office and staff welfare building, fire water holding tanks and pumphouse, underground surface water drainage tanks and pipework, package sewage treatment plant and pipework, vehicle wash system, staff car and cycle parking, vehicle hardstanding, fencing, landscaping, formation of accesses to site and associated works.**

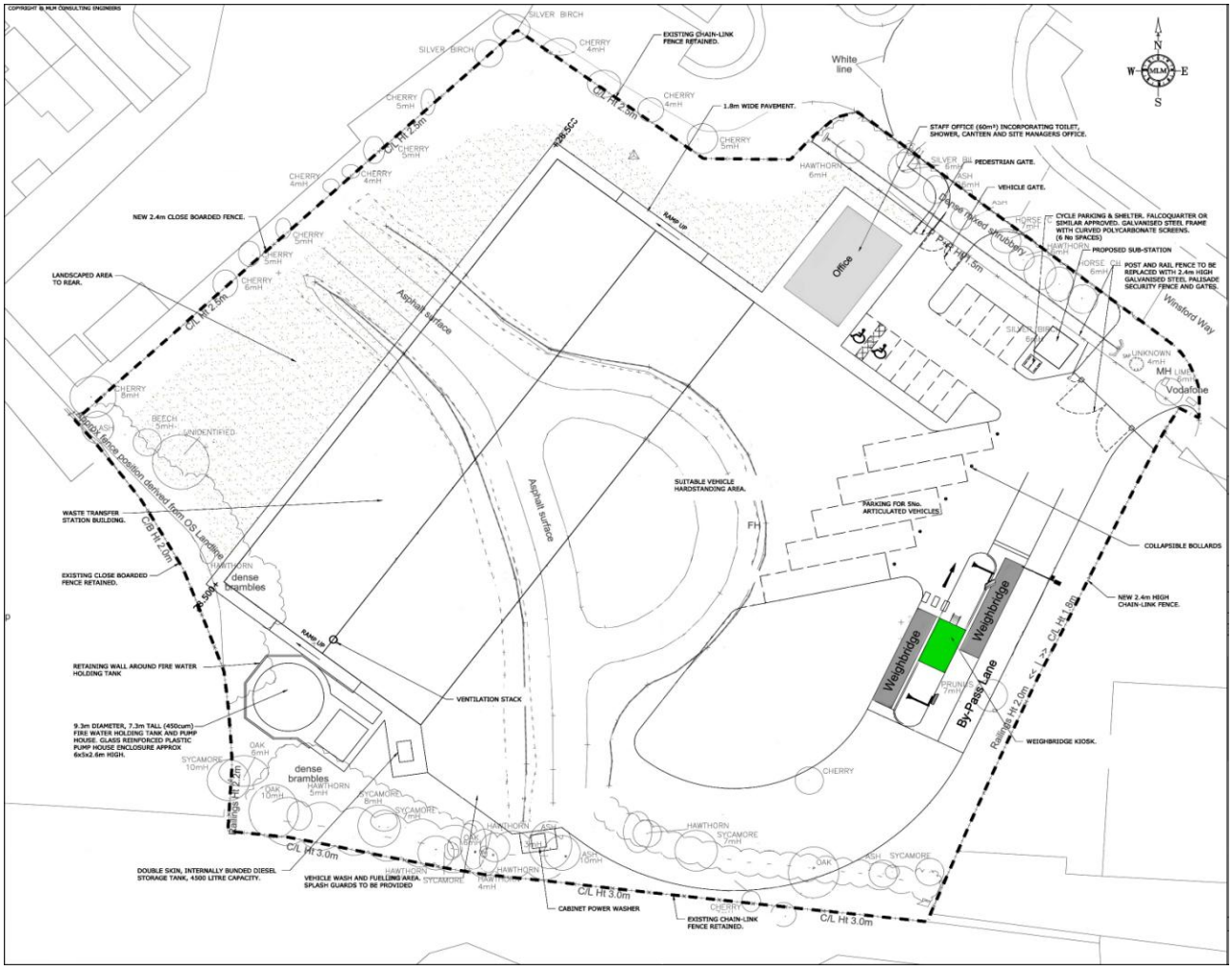
Location: **Land on the west side of Winsford Way, Chelmsford, CM2 5AA.**

Ref: ESS/65/12/CHL

Report by Assistant Director of Sustainable Environment and Enterprise

Enquiries to: Shelley Bailey Tel: 01245 437577


Fordson Road
Winsford Way
Site location
A12
SPRINGFIELD CP
Meters
0 70 140 280 420 560
Crown Copyright Reserved Licence Nº 100019602 2013



1. BACKGROUND & SITE

The application site is 1.3 hectares in size and is located off Winsford Way in Springfield, Chelmsford.

Winsford Way itself bounds the site to the north east and the Post Office depot is located on the opposite side of the road. A distribution warehouse (ALDI) is located to the south west, and an industrial unit (Global Marine) is located to the north. Fordson Road is located beyond a compound to the north west of the application site.

The area is currently undeveloped and covered with scrub vegetation. Ground levels currently fall from the north west to the south east.

Prior to its demolition in the mid-1990's, housing forming part of the Fordson Road development extended into the development site.

The nearest residential property is located in Fordson Road. The boundary of the property is located approximately 28m to the north west of the application site.

A Grade II Listed Building (Sheepcotes) is located over 80m to the south east and is surrounded by the existing Employment Area.

The site would be accessed via Winsford Way from the Winsford Way roundabout at the Boreham Interchange.

The site forms the north west boundary of an Employment Area as designated by the Chelmsford Borough Council Adopted Proposals Map.

2. PROPOSAL

The proposed development would provide a facility for the bulking up of waste for more efficient onward transportation to waste treatment facilities elsewhere in the county. It forms part of the delivery of an integrated network of new waste management facilities for the County's municipal waste (household waste and any other waste collected by, or on behalf of, a council).

The proposed development has been designed to transfer waste collected in the Chelmsford City and Maldon District Council areas. It would accommodate up to 90,000 tonnes or waste per annum.

The main building would be 76.5m x 32.25m with a height of 11.8m to the ridge line in a range of grey colours. It would hold 13 bays to accommodate waste for onward transfer and a ventilation stack of 16.8m in height and 1.2m in diameter would be located on the western side of the roof.

The building has been proposed with a landscaped buffer on the north west boundary, in addition to the existing stand-off between the site and the properties in Fordson Road.

Proposed operating hours are as follows:

0600 hours – 2000 hours Monday to Friday
0800 hours – 1600 hours Saturdays and Sundays

Proposed vehicle movements would take place mostly between 1000 hours and 1600 hours Monday to Friday.

Vehicles would enter via the main entrance off Winsford Way and turn on a hardstanding area located to the east of the proposed building.

High speed doors would allow vehicles to access the building and ensure waste handling would be performed with the doors closed.

The peak time for vehicle movements associated with the development has been assessed to be between 1400-1500 hours, when 49 two-way vehicle movements could be generated. This would not coincide with peak times on the surrounding highway network, which have been assessed as between 0800-0900 hours and between 1700-1800 hours.

3. POLICIES

The following policies of the Essex and Southend Waste Local Plan, (WLP), Adopted September 2001, and the Chelmsford Borough Council Core Strategy and Development Control Policies Adopted 20 February 2008 and the North Chelmsford Area Action Plan, (CCS), Adopted July 2011 provide the development plan framework for this application. The following policies are of relevance to this application:

	WLP	CCS
Securing Sustainable Development		CP1
Achieving Well Designed High Quality Places/ Ensuring Buildings are Well Designed		CP20 CP21
BPEO	W3A	
Need	W3C	
Flood Control	W4A	
Water Pollution	W4B	
Access	W4C	
Integrated Waste Management	W6A	
Materials Recovery Facilities	W7E	
Proposed Sites	W8A	
Alternative Sites	W8B	
Planning Conditions and Obligations	W10A	
Development Control Criteria/ Minimising Environmental Impact	W10E	CP13
Hours of Operation	W10F	
Securing Economic Growth		CP22
Protecting Existing Amenity		DC4
Amenity and Pollution		DC29
Achieving High Quality Development		DC45
Employment Areas		DC48
Industrial and Warehouse Development		DC52

It is noted that, as of 03 January 2013, the Regional Spatial Strategy for the East of England (RSS) has been revoked and therefore no longer forms part of the development plan.

The National Planning Policy Framework (NPPF), published in March 2012, sets out requirements for the determination of planning applications and is also a material consideration. It does not contain specific policies on waste, since national waste planning policy will be set out in the future National Waste Management Plan. In the meantime, Planning Policy Statement 10: Planning for Sustainable Waste Management, remains a material consideration in planning decisions.

Paragraph 214 of the NPPF states that, for 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004[1] even if there is a limited degree of conflict with the Framework.

The Chelmsford Borough Council Core Strategy and Development Control Policies Adopted 20 February 2008 and the North Chelmsford Area Action Plan Adopted July 2011 are considered to fall into paragraph 214.

Paragraph 215 of the NPPF states that in other cases and following this 12 month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework.

It is considered that the Essex and Southend Waste Local Plan (adopted 2001) falls within the meaning of 'other cases' under paragraph 215, and therefore due weight should be given to the relevant policies according to their degree of consistency with the Framework. Consideration of consistency in respect of each of the policies referred to in this report is noted at Appendix 1.

4. CONSULTATIONS

CHELMSFORD CITY COUNCIL – No objection subject to conditions controlling hours of use as submitted and to ensure that building doors would be closed during waste handling. Reminds the Waste Planning Authority that the application must be screen under the EIA Regulations.

ENVIRONMENT AGENCY – No objection subject to conditions relating to surface water drainage and the disposal of foul drainage. Comments that the development will require an Environmental Permit.

NATURAL ENGLAND – No comments received.

ENGLISH HERITAGE – No comments received.

ESSEX AND SUFFOLK WATER – No comments received.

ANGLIAN WATER SERVICES – No comments received.

ESSEX FIRE AND RESCUE – No comments received.

THE COUNTY COUNCIL'S NOISE CONSULTANT – No objection subject to conditions relating to operational noise limits and monitoring of noise levels. Comments that construction noise would be controlled by Chelmsford City Council.

THE HIGHWAY AUTHORITY – No objection subject to conditions covering the following:

- Vehicular accesses to be constructed in accordance with proposed drawings prior to commencement of development.

[1] In development plan documents adopted in accordance with the Planning and Compulsory Purchase Act 2004 or published in the London Plan.

- Gates to be inward opening and located as shown on the proposed drawings.
- Visibility splays to be provided and maintained.
- Details of measures to prevent the discharge of surface water onto the highway to be submitted prior to commencement of development.
- Details of areas within the site identified for turning/loading/unloading/reception and storage to be submitted prior to commencement of development.
- Construction management plan including construction vehicle routes and hours of deliveries to be submitted prior to commencement of development.
- Details of wheel washing facilities, segregated from pedestrian users, to be submitted prior to commencement of development.

WASTE DISPOSAL AUTHORITY – Supports the application. Comments as follows:

- The development would serve the Chelmsford and Maldon areas.
- A network of 6 transfer facilities would enable efficient bulk transfer of waste to strategic treatment facilities in accordance with the Joint Municipal Waste Management Strategy for Essex.
- The strategy aims to achieve 60% recycling of household waste by 2020.

PLACE SERVICES (Ecology) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No objection subject to the imposition of conditions relating to:

- The assessment of the presence of invertebrates,
- Adherence to the recommendations in the Preliminary Ecological Assessment,
- Protection of existing habitats to be retained during construction,
- A landscape scheme incorporating biodiversity,
- A scheme of management and long term monitoring of new habitats,
- No removal of vegetation during the bird nesting season,
- A revised ecological assessment should commencement be delayed by more than 3 years,

and an informative requiring works to stop should Great Crested Newts or reptiles be found during construction.

PLACE SERVICES (Trees) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No objection. Recommends conditions relating to the tree works and tree protection measures proposed in the application. Requests a condition relating to tree and shrub planting details with a method statement and maintenance schedule.

PLACE SERVICES (Historic Environment) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No objection. Trial trenching has shown the area to be heavily disturbed.

PLACE SERVICES (Historic Buildings) ENVIRONMENT, SUSTAINABILITY AND

HIGHWAYS – No objection. The character of the historic setting of the Grade II listed Sheepcotes Cottages has already been compromised due to the surrounding industrial area.

PLACE SERVICES (Urban Design) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No objection subject to the imposition of conditions covering the following:

- Details of boundary fencing colour and design.
- An amended landscaping drawing showing retention of planting up to the visibility splay on Winsford Road.
- Details of the gates' colour and design.
- Details of the substation design.
- Details of the office design, materials and colour.

PLACE SERVICES (Landscape) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No comments to make.

BOREHAM PARISH COUNCIL – Objects to the application due to the impact of traffic on the local area.

SPRINGFIELD PARISH COUNCIL – Objects to the application due to the following:

- Airborne particles dispersed by a fan would cause a health hazard.
- Carcinogenic fumes from lorries and machinery.
- Noise pollution and vibrations for Fordson Road residents.
- Odour.
- Vermin and associated lice particularly in summer.
- Visual impact and overshadowing for local residents.
- The Listed Sheepcotes is in close proximity.
- Natural habitats e.g. a pond nearby have not been assessed.
- Not suitable near to residential properties, ALDI, Sainsbury's and proposed Greater Beaulieu Park housing.
- Traffic congestion would be increased.
- Traffic modelling should include White Hart Lane and the increase in vehicle numbers from Greater Beaulieu Park.
- The road network from Chelmsford to Maldon is not suitable for increased traffic via Danbury or Hatfield Peverel.
- Lorries using the weighbridge twice would result in more movements than forecast.

LOCAL MEMBER – CHELMSFORD – Chelmer – Any comments received shall be reported.

5. **REPRESENTATIONS**

45 properties were directly notified of the application. 61 letters of representation have been received together with 2 petitions containing 12 signatures and 96

signatures respectively. These relate to planning issues covering the following matters:

Observation	Comment
Location	
Not a suitable location close to a residential area. A remote location should be considered.	See appraisal.
Proximity to Grade II Listed properties.	See appraisal.
Proximity to a proposed retail/office block.	The location is appropriate - see appraisal.
The land to the east of A12 Junction 19 should be considered.	The exact location hasn't been provided. However, the Waste Planning Authority can only consider the application which is presented to it.
Environment and Health	
Odour from waste and traffic in addition to the smell of the existing Storms Way sewage works.	See appraisal.
Noise pollution from vehicles, reversing lorries (even white noise alarms) and doors opening and closing. The site is not large enough to accommodate forward vehicle movement only.	See appraisal.
Health impact on residents and school children and local businesses.	See appraisal.
Health implications from airborne waste particles of locating close to food - e.g. ALDI food distribution depot and Sainsbury's superstore.	See appraisal.
Environmental impact on residents and school children.	See appraisal.
Carcinogenic diesel fumes from lorries and machinery.	See appraisal.
Attraction of vermin, rats, gulls, wasps, flies, squirrels and foxes and associated	See appraisal.

lice/parasite infection.	
Dust impact.	See appraisal.
Absence of adequate landscaping.	See appraisal.
Visual impact of the development itself.	See appraisal.
Obscuring of the view of Little Baddow from Fordson Road properties.	There is no right to a view in Planning law.
Health impacts of asbestos accidentally deposited in the waste.	See appraisal.
Light pollution.	See appraisal.
The proposed operating hours are unacceptable next to a residential area. Weekend and bank holiday opening would create noise when residents want to enjoy the time at home.	See appraisal.
90,000 tonnes of waste per year would grow each year. CO2 emissions would be high.	The total tonnage could be controlled by planning condition should permission be granted. Mileage travelled and fuel consumed would be less than if the waste transfer station was not built.
The noise assessment was carried out in rain and is not reliable.	See appraisal.
There is a risk of fires.	This is not a planning issue. An Environmental Permit would be required.
The proposed vent pipe will affect the health of nearby office workers.	See appraisal.
Nearby businesses have workers outside who will be subjected to increased noise and air pollution.	See appraisal.
The fresh air circulation in a nearby business will take contaminated air into the building.	See appraisal.
The 16m vent pipe has not been evidenced to be sufficient to deal with emissions. There is only computer generated assessment.	See appraisal.

How would a 3-day limit on the storage of waste be policed?	The applicant has confirmed that the operators' contracts would stipulate removal on a daily basis, with 3 days being a worst-case scenario to allow flexibility for Bank/Public Holidays if required.
The building would block natural light to neighbouring houses.	See appraisal.
Residents would be affected by vibrations.	An assessment has been included with the application which shows that vibrations would not have a significant effect on residents during construction; however the applicant proposes to use 'best practicable means' to control noise and vibration in any case.
Great Crested Newts may be sustained on site and the presence of badger setts can't be ruled out.	See appraisal.
<u>Traffic and Highways</u>	
There is already traffic congestion around the Sainsburys and nearby roundabouts during peak and off peak times and the A12 is of inadequate width.	See appraisal.
There is not the capacity for traffic from the proposal as well as the A12, service area, McDonalds, Royal Mail, ALDI, Sainsburys and proposed new schools, homes and train station (Beaulieu Park).	See appraisal.
Colchester Road and White Hart Lane are already congested and not constructed or maintained to cope with high levels of traffic.	See appraisal.
The site peak hour of 1400-1500 hours would generate 49 two-way vehicle movements. Would this affect White Hart Lane?	See appraisal.
Increased risk of accidents on the road.	See appraisal.

J19 of the A12 was voted the third worst in the Country in 2009 and the volume of traffic has increased since then.	Noted.
The roundabout is the dedicated route for the hospital, Stansted Airport and the police and emergency services accessing the A12 and will be grid-locked with the proposed level of traffic.	See appraisal.
Traffic lights along the A130 already cause congestion.	Noted.
Projected fuel savings proposed are incorrect and do not take account of all factors.	The applicant has further confirmed that there is a clear saving of mileage travelled and therefore fuel used with the development of the transfer station compared to the existing scenario and to direct delivery to Basildon.
The applicant should demonstrate nil detriment to the A12 to the satisfaction of the Highways Agency.	There is no requirement to consult the Highways Agency according to the Town and Country Planning Development Management Procedure Order.
Traffic surveys have not been carried out and data is based on out of date information from November 2011.	See appraisal.
Proposed double yellow lines along Winsford Way will impact on parking locally which is already a major issue.	Double yellow lines are not proposed in the application or required by the Highway Authority.
The statement of community involvement states that the lack of a WTS would result in increased vehicle movements by RCVs through the Boreham Interchange to the facility at Basildon, however the number of waste vehicle movements through the Interchange would increase as a result of the WTS as it would involve every RCV plus the bulk collection vehicles.	The SCI is incorrect. Traffic movements would increase at the interchange if the WTS is built but this is shown in the Transport Statement to be non-significant. The Transport Statement also refers to a 3% reduction in traffic flows over the past 3 years.
<u>Procedure</u>	
Why was the proposed development not made more public?	The application was advertised in accordance with statutory requirements.

A public consultation in 2011 indicated that a site 500m away opposite the B&Q store may be proposed. No mention of Winsford Way was made.	See appraisal.
Properties within 500m were leafleted regarding the exhibition, but some are not aware of the proposals. 500m is inadequate. The press advert was seen. The Council has failed to adequately inform residents.	On 3rd October 2011 Essex Waste Strategy held a public exhibition regarding the proposed development. Properties within 500m of the proposal site were prior notified by Essex Waste Strategy.
The Planning Authority has notified correctly using a 250m radius. The site notices were difficult to read and find. The planning application was not at the library during the specified time period and the fact that the documents were available online was not publicised.	The 250m notification radius is derived from the adopted Statement of Community Involvement. Site notices were placed on the site gate, on the post opposite the site, on a post at the top of Winsford Way and in Fordson Road. This exceeds statutory requirements. The library confirmed that it did have the application when the WPA telephoned to find out. The documents were published online by Essex Waste Strategy, not the WPA.
The consultation letter took 15 days to arrive.	The letters were posted on time.
How is the application being considered impartially if Essex County is the applicant and determining authority?	Essex County Council as Waste Planning Authority can and does legitimately and impartially determine applications from other departments within Essex County Council.
The library chosen to hold the public consultation documents was inadequate, being located too far away and having part-time opening hours.	Broomfield Library was chosen as the library for the placement of the application documents because it was identified as the closest to the application site.
The application was advertised in the Chelmsford Weekly News and not the Essex Chronicle which is more appropriate.	The planning application was advertised in the Chelmsford Weekly News. The most appropriate newspaper is automatically chosen through the County Council's advertising contract.
The ALDI depot was identified as a warehouse on the drawings. It should have been identified by name.	The Aldi premise's function is a distribution Warehouse, so is therefore correctly described. Aldi was sent an

	invitation to the public exhibition and, being within the required 250m radius of the site, the Waste Planning Authority has sent a direct neighbour notification letter to the property advising of the submission of the application. It has the opportunity to lodge any representation.
Only 1 notice was put up at the Business Park and this was inappropriate being at the exit onto the roundabout.	4 notices were put up at the site boundary, along Winsford Way and in Fordson Road. This exceeds the statutory requirements.
No reference to road names, a north sign or the ALDI store on the Location Map.	The location plan is fit for purpose. A further location plan was also included with the site summary.
The Council claim 420 leaflets were distributed prior to the public exhibition on 3rd October, but there are only 40 companies on the Business Park and one states they didn't receive notification.	Leaflets were distributed to properties within 500m of the site boundary by a distribution company on behalf of Essex Waste Strategy. The distribution company did inform Essex Waste Strategy that one company refused to take a leaflet and so they made contact with them via other means.
The boards at the public exhibition showed traffic entering the A12 directly from the Winsford Way roundabout and travelling the wrong way up the A12 rather than using the 2 Boreham Interchange roundabouts.	Regrettably there was an error on the exhibition board promoted by Essex Waste Strategy, but this has been corrected in the submitted application
The applicant has not adequately researched the planning history of the site. Planning Officers should do so.	The background has been researched and Chelmsford City Council Planning Officers raise no objection.
A CD issued by the WPA contained more information than was contained on ECC's website. The consultation period may need to be extended to address this issue.	The Waste Planning Authority does not yet have the capability to display applications on its website. The Waste Disposal Authority chose to display documents relating to the application on its website. A CD was sent to this particular representee as they would have to travel a long distance to view the hard copies. It was made clear at the time that the definitive copy of the

	application should be viewed in hard copy as advertised and that the WPA could accept no responsibility for the documents displayed by the WDA. The correct procedure has been followed.
The statement of community involvement states that 50 local residents attended the public exhibition at Springfield parish centre, however it was a total of around 10 and the residents were only from Fordson Road.	The applicant has confirmed that the SCI is correct. Attendees included local councillors, Chelmsford City Council officers, representatives from surrounding businesses and residents of Springfield Road.
<u>Other</u>	
The area would be devalued.	Not a material planning consideration.
The external cable testing rig development ref 98/00637/FUL was permitted subject to conditions. Similar conditions should be imposed, namely: landscaping and maintenance; operating hours of 8am-6pm weekdays and 8am-12pm Saturdays; noise restrictions; controls over vibrations from machinery at Fordson Road; odour; dust; vermin.	This development was permitted by Chelmsford City Council on land between the proposal site and Fordson Road. The impacts of the development are considered in the appraisal.
Article 8 (Right to respect for private and family life) of the Human Rights Act has been disregarded.	The requirements of the Human Rights Act 1998 should be considered. The human rights of the adjoining residents under Article 8, the right to respect for private and family life, and Article 1 of the First Protocol, the right of enjoyment of property are engaged. A grant of planning permission may infringe those rights but they are qualified rights; that is that they can be balanced against the economic interests of the community as a whole and the human rights of other individuals. In making that balance it may also be taken into account that the amenity of local residents could be adequately

	safeguarded by conditions. However, in this instance it is not considered that there would be any disproportionate interference with the human rights of adjoining residents.
How were the waste transfer sites chosen and how can residents find out about them?	See appraisal.
The application is contrary to WLP Policy W8B – i.e. other sites have not been shown to be less suitable. The site WM6 at Sandon should be more seriously considered as an alternative. Consideration should also be given to splitting the site into two 45,000tpa facilities using the Springfield Depot site as the other location.	A split site proposal is not before the Waste Planning Authority for consideration. See appraisal.
The building design should be more modern with high quality materials for sound abatement and the use of negative pressure to prevent odours. In accordance with the NPPF, the applicant should consult adjoining neighbours on the design.	See appraisal.
The site is a designated Employment Area in the North Chelmsford Area Action Plan, located in allocated Site 19 in the AAP, and is not allocated for waste use in any waste policy.	See appraisal.
The proposal is a sui generis use not a B Class use and is not a depot of the kind envisaged by the AAP.	See appraisal.
The development is contrary to Policies CP22 and DC48.	See appraisal.
The proposed site was never included in the WDD Preferred Approach as one of the sites which would serve the County best.	See appraisal.
There should be appropriate failsafe measures and compensation if any of the simulated impacts are exceeded in	Planning conditions and enforcement control would ensure appropriate control of the development if expedient

any way.	to do so. Compensation is not legitimately through planning control.

6. **APPRAISAL**

The key issues for consideration are:

A. Need and Principle
B. Policy Considerations
C. The Historic Environment
D. Landscape and Visual Impact
E. Impact on Amenity
F. Traffic & Highways
G. Water and Flood Impact
H. Ecological Impact

In respect of Environmental impact Assessment, a Screening Opinion was requested by the applicant and subsequently issued by the Waste Planning Authority in October 2012 confirming that an Environmental Impact Assessment would not be required. The development has since been 're-screened' by the Waste Planning Authority and the same opinion has been issued – EIA is not required.

It is considered that sufficient information has been provided to determine the application.

In considering the impact of the proposed development, it should be noted that transport, noise, odour, flood risk, ecological and landscape and visual assessments are among the reports included with the application.

In the decision in "*Coventry -v- Lawrence [2012] EWCA Civ 26"* the Court of Appeal was asked to consider whether the noise arising through the use of land as a racetrack could constitute a private nuisance.

Jackson LJ summarised the law as follows:

1) *A planning authority, by the grant of planning permission, cannot authorise the commission of a nuisance;*
2) *Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of the locality*
3) *It is a question of fact whether the grant and implementation of the planning permission does have the effect of changing the character of the locality;*
4) *If the character of the locality is so changed then*
   a) *the question whether a particular activity in that locality constitutes a nuisance must be decided against the background of its changed character;*
   b) *one consequence may be that otherwise offensive activities in that locality cease to be a nuisance.*

The Judge made it clear that the planning system exists to protect the public interest and not to protect private interests. The case law examined in the above case led the judge to comment that if the Planning Authority had made a decision in the public interest then the consequences had to be accepted.

The question of whether a private nuisance may arise following the grant and implementation of a planning permission is a matter between the developer and the aggrieved party. Planning applications have to be determined in accordance with Section 38(6) of the Town and Country Planning Act 1990, which requires that they are "*determined in accordance with the Development Plan unless material considerations indicate otherwise*".

A NEED AND PRINCIPLE

Need

Planning Policy Statement 10: Planning for Sustainable Waste Management (PPS10) states that 'the overall objective of Government policy on waste, as set out in the strategy for sustainable development, is to protect human health and the environment by producing less waste and by using it as a resource wherever possible. By more sustainable waste management, moving the management of waste up the 'waste hierarchy' of prevention, preparing for reuse, recycling, other recovery, and disposing only as a last resort, the Government aims to break the link between economic growth and the environmental impact of waste.'

Waste Local Plan Policy W3C (Need) requires waste developments with a capacity of over 25,000tpa to demonstrate a need for the development in the context of waste arising in Essex and Southend. Where the proposal has a capacity of over 50,000tpa conditions may be imposed to restrict the source of waste to that arising within the Plan area. It is considered that such a condition could be imposed in the event that permission is granted.

As explained further in the report, Essex and Southend Waste Disposal Authorities have identified a need for 6 waste transfer facilities to support the delivery of the Municipal Waste Management Strategies.

At the heart of these documents is the need to move the management of waste up the waste hierarchy.

WLP Policy W6A (Integrated Waste Management) also requires, in summary, that the Waste Planning Authority should work with the Waste Disposal Authority to support and promote initiatives to reduce, reuse and recycle waste in an environmentally acceptable manner.

There is, therefore, considered to be a strategic need for the development in accordance with WLP Policy W3C. The appropriateness of the proposed location and environmental acceptability in accordance with WLP Policy W6A will be considered further in the report.

Principle

The Waste Development Document: Preferred Approach was published for consultation in 2011.

The 2011 Capacity Gap Report[2] shows that under both forecast scenarios, there should be a small surplus of waste transfer capacity at the end of the plan period (the year 2031). However, there are only eight waste transfer stations currently receiving Municipal Solid Waste and having regard to the Waste Disposal Authorities' requirements, there is an identified need for a network of six new waste transfer stations (5 in Essex, 1 in Southend) required early in the Plan period to support the delivery of the Municipal Waste Management Strategies. Information about the Joint Municipal Waste Management Strategy for Essex and the 6 waste transfer stations can be found at:

http://www.essex.gov.uk/Environment%20Planning/Recycling-Waste/Waste-Strategy/Pages/Waste-transfer-stations.aspx.

The WDD therefore identifies 4 sites as suitable for use as MSW transfer stations. The Chelmsford site was identified as the Springfield Depot site and a one-day public consultation event took place to this effect.

The Waste Disposal Authority has, however, chosen to put forward the site at Winsford Way as an alternative location due to the Springfield Depot being too small for the proposed tonnage.

The Replacement Waste Local Plan (RWLP) (the new name for the Waste Development Document) has yet to reach 'submission stage'. It is therefore too early in the development of the RWLP for it to be a material planning consideration, thus the Winsford Way proposals should be considered against the requirements of the existing Waste Local Plan.

The Companion Guide to PPS10 states that '…planning applications that come forward for sites that have not been identified, or are not located in an area identified, in a DPD as suitable for new or enhanced waste management facilities, may help implement the planning for waste strategy and should not be lost simply because they had not previously been identified. The key test is their consistency with PPS10 and the waste planning authority's core strategy. Where they are consistent they should be considered favourably.'

WLP Policy W3A (BPEO) requires, in summary, that the WPA considers the consistency with the goals and principles of sustainable development, best practicable environmental option, conflict with other options further up the waste hierarchy and conformity with the proximity principle (although this has been replaced by PPS10). The policy also requires promotion of the waste hierarchy and the identification of specific locations for waste management facilities.

According to the Joint Municipal Waste Management Strategy (JMWMS) and the benefits put forward by the applicant as explained further in the report, the

[2] Limited weight should be attributed to the Waste Capacity Gap Report as it has not yet been independently tested at Examination in Public.

proposed development would comply with WLP Policy W3A.

With regard to location, the proposal site is within an Employment Area as designated by the North Chelmsford Area Action Plan. CCS Policy DC52 (Industrial and Warehouse Development) permits, in summary, the expansion, conversion or redevelopment of premises for uses falling within Use Classes B2 and B8 in the Springfield Business Park Employment Area.

It is acknowledged that the proposal is for a waste or 'sui generis' use, but it is considered that it is akin to a B2 use given the industrial nature. It is also noted that Chelmsford City Council considers the 'proposal would deliver an essential facility to serve Chelmsford City and Maldon District Council areas. The proposal is therefore considered to be acceptable in principle' in relation to Policy DC52.

In addition, WLP Policy W7E (Materials Recovery Facilities), in summary, supports waste transfer stations at locations subject to WLP Policy W8B (Alternative sites).

Accordingly, WLP Policy W8B, in summary, permits large-scale waste management facilities in Employment Areas if the locations shown in Schedule 1 are shown to be less suitable or not available.

Of the 6 sites in Schedule 1, only one is in Chelmsford, that being site WM6 Sandon. The applicant has assessed this site as unsuitable due to the inability to integrate the proposals with the restoration of the existing quarry void, as required by the adopted Waste Local Plan, and conflict with on-going permissions on the site.

WLP Policy W8B also requires the criteria of WLP Policy W8A (Proposed Sites) to be met. These criteria will be considered further in the report.

Therefore, the development is considered to comply with CCS Policy DC52 and WLP Policies W3A, W7E and W8B subject to compliance with Policy W8A.

Further, a representation has been received stating that the development would be contrary to CCS Policy DC48 (Employment Areas) which, in summary, requires refusal of redevelopment or change of use of business, general industry and distribution sites or premises for non-Class B1, B2 and B8 purposes unless the alternative use cannot be located elsewhere and there is no reasonable expectation of the B-Class uses being retained.

The application site is allocated for Employment Use but has been vacant since the mid-1990's, prior to which it contained housing. The site has been extensively marketed by the site owners and the applicant has stated that there is little prospect of an alternative use given the current climate. The applicant has demonstrated a need for the development, as explained previously in the report, and Chelmsford City Council has not raised Policy DC48 as relevant. It is therefore considered that there would be no conflict with this policy.

It is important to note that paragraph 22 of the NPPF states '…where there is no

reasonable prospect of a site being used for the allocated employment use, applications for alternative uses should be treated on their merits having regard to market signals and the relative need for different land uses to support sustainable local communities.'

It is considered that the development would comply with this aspect of the NPPF.

B POLICY CONSIDERATIONS

The NPPF does not contain specific waste policies, since national waste planning policy will be published as part of the National Waste Management Plan for England. Until then, PPS10 remains in place. However, local authorities taking decisions on waste applications should have regard to policies in the NPPF so far as relevant.

The NPPF sets out a presumption in favour of sustainable development. There are three dimensions to sustainable development: economic, social and environmental. These dimensions should be sought jointly and simultaneously through the planning system.

With respect to the proposed development, the economic role has been explained through an Economic Statement submitted with the application. It states that landfill is no longer a desirable way to manage the County's waste due to an average gross cost of municipal waste management of £60.64 per tonne. In 2010, Essex County Council paid over £15.8 million in landfill tax and without a network of treatment facilities (of which this proposal would be one) that figure would rise over the coming years.

It is estimated that the implementation of the Joint Municipal Waste Management Strategy for Essex (as explained further in the report) would save Essex tax payers £750 million over the next 25 years.

The proposed development would also provide direct employment during the construction and operational phases. It is estimated that 4 full time equivalent jobs would be created through the construction phase (over a 12 month period) and 4 full time equivalent jobs would be created during operation.

CCS Policy CP22 (Securing Economic Growth) seeks to maintain high and stable levels of economic and employment growth in Chelmsford City. A representation has been received stating that the proposed development conflicts with this policy. Due to the economic factors above it is considered that there is no conflict with this policy. Indeed, the report by Chelmsford City Council does not mention this policy and there is no objection from the City Council.

The social role of the proposed development would be achieved by wider benefits to the environment through the reduction in landfill, which will be explained further in the report. Ultimately landfill capacity is reducing and it would benefit the community as a whole for alternative methods of waste management to be developed.

The environmental role will be considered further in the report.

CCS Policy CP1 (Securing Sustainable Development) seeks to promote and secure sustainable development. In connection with the environmental role explained previously, consideration of whether the proposed development achieves this will be made further in the report.

C THE HISTORIC ENVIRONMENT

The NPPF requires local planning authorities to require the applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. In this case, the applicant has provided a Heritage Statement with the application.

WLP Policy W10E (Development Control Criteria) permits waste management development where satisfactory provision is made in respect of the effect of the development on historic sites.

The closest heritage asset to the site is the Grade II Listed Sheepcotes Cottages located over 80m to the southeast. The property is located within grounds approximately 0.4ha in area, consisting of a lawn area surrounded by tree planting which adequately screens the property from the road.

The location of the cottages is on the western frontage of Sheepcotes close to the mini-roundabout with Winsford Way.

It is considered important to note that the original agricultural setting of the cottages has already been altered with the construction of the A12 and the surrounding Employment Area.

The roof of the proposed transfer building would be visible from the cottages unless screened along the southern boundary. However, due to the existing alterations to the area it is considered that the setting of the listed building would not be adversely impacted further.

The Historic Buildings Advisor has raised no objection to the development.

It is therefore considered that the proposed development would comply with the provisions of the NPPF and WLP Policy W10E.

D LANDSCAPE AND VISUAL IMPACT

WLP Policy W10E (Development Control Criteria) permits waste management development where satisfactory provision is made in respect of the effect of the development on the landscape and the countryside.

The nearest residential property is located in Fordson Road. The boundary of the property is located approximately 28m to the north west of the application site and

beyond a storage area.

The application proposes a landscaped area to the north west of the building measuring approximately 30m wide. This would result in the nearest property in Fordson Road being located approximately 60m from the proposed building.

The planting would grow to a height of 6-8m within 5-8 years of planting to assist in mitigating and filtering views into the site.

The western and southern boundaries already contain existing vegetation and this is proposed to be retained where possible and supplemented with new planting to provide dense screening.

The south east boundary is proposed to be planted with new trees and hedge to screen views of the site from the adjoining property.

The eastern boundary along Winsford Way would contain retained planting sufficient to allow visibility splays for vehicles entering/exiting the site.

The Tree Officer has requested conditions relating to the tree works and protection methods proposed in the application as well as a method statement and maintenance schedule. It is considered that such conditions could be imposed in the event that permission is granted.

In addition, a 2.4m high close boarded fence is proposed along the north west boundary.

Design

CCS Policy CP20 (Achieving Well Designed High Quality Places) requires, in summary, the layout and design of development to be sensitive to its context.

CCS Policy CP21 (Ensuring Buildings are Well Designed) requires, in summary, new buildings to be fit for purpose, appropriate for the site and its setting and to make use of sustainable construction techniques.

CCS Policy DC45 (Achieving High Quality Development) requires, in summary, well designed buildings, appropriate visual relationship with the surroundings and between buildings within the site, and well-proportioned elevations. Specifically with regard to commercial buildings, the policy requires the siting, scale, form skyline and elevations to contribute to the townscape of the area, car parks and service bays to be hidden from view, active street frontages, and the avoidance of monolithic buildings.

The form of the main building is largely dictated by the proposed function which requires a minimum internal building footprint and internal ceiling height to accommodate the amount of waste proposed and the dimensions of the loading shovel.

The roof would be comprised of profiled steel sheet cladding with transparent

rooflights at 6m intervals.

The walls would be grey cladding to fit with the surrounding buildings and the lower level of all elevations would consist of exposed concrete push walls.

The building itself would be orientated so that the 'rear' would be facing towards Fordson Road. There would be no vehicular entrances or exits on this elevation. Vehicles would only be allowed to travel around the rear of the building for maintenance purposes.

The building has also been located so that it would be set into the existing slope to reduce its apparent height when viewed from the north.

The development has been designed to achieve BREEAM 'Very Good' status. The main building would be unheated and has been designed to maximise the use of natural light and minimise the use of power through efficient lighting systems and fan motors.

The design would re-use materials and use recycled materials where possible. Excavated material would be used on site and the guidance issued by WRAP on resource efficient construction would be followed.

The Urban Design Officer has no objection to the proposals subject to conditions requiring precise details of the design of the boundary fencing and ancillary buildings as well as a landscaping scheme.

Lighting

External lighting would be provided by free-standing 8m high columns and fixed to the main building. All lighting would be designed to minimise light spillage, details of which have been submitted with the application. A CCTV camera system is also proposed.

It is therefore considered that the proposed development would be appropriate within the Employment Area location and in this context there would be no significant landscape or visual impact in compliance with WLP Policy W10E and CCS Policies CP20, CP21 and DC45.

E IMPACT ON AMENITY

CCS Policy CP13 (Minimising Environmental Impact) seeks to ensure that development has minimal impact on the environment and does not give rise to significant adverse impacts on health, amenity and the wider environment.

CCS Policy DC4 (Protecting Existing Amenity) requires all development to not result in excessive noise, activity or vehicle movements, overlooking or visual intrusion, and the built form would not prejudice outlook, privacy or light for nearby properties.

CCS Policy DC29 (Amenity and Pollution) requires refusal of development which

would give rise to polluting development.

WLP Policy W10E (Development Control Criteria) permits waste management development where satisfactory provision is made in respect of the development on the amenity of neighbouring occupiers from noise, smell, dust and other pollutants.

The proposal site is located next to uses which are, in the main, commercial in nature as appropriate within the Employment Area. As mentioned previously in the report, the closest properties are in Fordson Road over 50m away from the proposed building.

As stated previously in the report, the building has been designed and orientated to take account the sensitivity of the properties in Fordson Road. The ground level is also proposed to be increased in the area to the north east of the building to assist in screening. This is notwithstanding the fact that the whole site has been deemed acceptable for the proposed use through its designation as an Employment Area.

Odour and Vermin

The development proposes the bulking and transfer of waste including food waste, which does have the potential to create odour.

All vehicles arriving at the site would be sheeted or enclosed. Waste would be unloaded onto the floor inside the building with the building doors automatically closed.

A loading shovel would then stack the waste against the 5m high push walls, thereby minimising the surface area of waste and potential for odour whilst also keeping the floor at the front of the building clean. Waste would be removed from site daily by sheeted articulated lorries.

Food waste would be immediately loaded onto sealed RORO containers and removed daily.

A comprehensive odour assessment has been included with the application. An odour control system would be in place in the form of a 5m high (above the ridge line) fan-based ventilation stack designed to meet the requirements of the Environment Agency. The system would extract air at a rate of 2.5 air changes per hour during the day and 1.0 air change at night. This would be sufficient to disperse odour concentrations to acceptable levels which would not cause any significant impact on amenity at commercial and residential premises surrounding the site.

Additionally, a misting system used to suppress air borne dust could also be used for odour suppression solutions if required.

It is noted that the NPPF states that local planning authorities should focus on whether the development itself is an acceptable use of land, and the impact of the

use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively.

The Environment Agency has confirmed that an Environmental Permit would be required for the proposed development .The Waste Planning Authority is therefore confident that odour would be adequately controlled.

Noise

The building would only be accessible via the south east façade, with all vehicle circulation taking place in this south east area, furthest from the residential properties.

To minimise noise nuisance for residents and businesses, the doors would be closed except to allow access vehicles and reversing alarms would be 'white noise'.

The applicant has provided additional information to support the noise measurements originally submitted with the application. The County Council's noise consultant is satisfied that representative background noise level data has been used to assess the impact of the development. The consultant has no objections to the scheme subject to the imposition of conditions relating to operational noise limits and monitoring of noise levels. It is considered that such conditions could be imposed in the event that permission is granted.

The proposed working hours are considered to be acceptable, taking into account the Employment Area location and the proximity of the nearest residential properties. Although conditions would not normally be imposed in relation to working hours in an Employment Area location, it is noted that Chelmsford City Council has requested that they are restricted to those proposed in the application. Taking this into account, together with the representations received from local residents, it is considered that such a condition could be imposed in the event that permission is granted, in compliance with WLP Policy W10F (Hours of Operation) which allows such a restriction.

Dust

A mist spray system would be included in the building for dust suppression, together with hose reels for cleaning purposes.

Light levels

A Daylight and Sunlight Assessment has been included with the application. It concludes that there would be some overshadowing of one property in Fordson Road between the hours of 0600 and 0700. The report concludes that this would be a negligible impact. The impact on the amount of daylight received by that property was also concluded to be negligible.

All of these aspects are considered to contribute to the protection of the

surrounding population in terms of health and amenity, as well as the general environment. It is therefore considered that the development would result in no significant harm to the amenities or health of the neighbouring residents or businesses in compliance with CCS Policies CP13, DC4 and DC29 and WLP Policy W10E.

F TRAFFIC AND HIGHWAYS

WLP Policy W10E (Development Control Criteria) permits waste management development where satisfactory provision is made in respect of the impact of road traffic generated by the development on the highway network.

WLP Policy W4C (Access) promotes an approach in accordance with the County's road hierarchy, and primarily requires access for waste management sites to be by a short length of existing road to the main highway network via a suitable existing junction.

The application includes a Transport Statement.

Access to the site would be off Winsford Way, an existing road 9m in width within the Employment Area. This cul-de-sac section of Winsford Way is accessed via a mini-roundabout which connects the remaining section of Winsford Way to the A130 Colchester Road roundabout to the north. From there, the A12 is readily accessible to vehicles.

The application has made use of existing traffic data from surveys undertaken for the Beaulieu Park development, which is an application for 3,600 houses and employment uses being dealt with by Chelmsford City Council. The data was collected in November 2011.

The proposed traffic generated from the development would be 4 vehicles during the local network a.m. peak (0800 – 0900 hours) and 2 vehicles during the p.m. peak (1700-1800 hours). The peak hour for the site would be between 1400 – 1500 hours when it has been predicted that the development would generate 49 movements. The overall development traffic would equate to 1% of total flows on Winsford Way.

Vehicle types would include staff cars, roll-on roll-off vehicles, articulated vehicles, street sweepers and Refuse Collection Vehicles (RCV's). The smaller vehicles would deliver the waste and it would then be transferred to the larger vehicles before being removed from site. Approximately 10% of vehicles may need to be weighed twice due to carrying two waste types.

The application proposes the removal or reduction of existing vegetation along the eastern boundary to ensure the achievement of sightlines adjacent to the accesses but vegetation would be retained where possible.

10 car parking spaces plus 2 spaces for disabled users are proposed, together with 6 cycle parking spaces.

There would also be a staff office and welfare building including a shower and changing room facilities should staff choose to cycle.

The nearest bus stop to the site is within 400m on Colchester Road. There are also cycle routes nearby. Therefore, staff would have the opportunity to use a variety of travel methods to get to and from work.

Therefore, the impact on the highway network as a result of the proposed development would be neutral. It is further noted that the provision of the transfer facility would reduce travel times, journeys and fuel use for waste-carrying vehicles from the Chelmsford area.

The Highway Authority has raised no objection subject to the imposition of conditions, which it is considered would be acceptable should planning permission be granted.

The development is therefore considered to comply with WLP Policies W10E and W4C.

G WATER AND FLOOD IMPACT

WLP Policy W4A (Flood Control) requires, in summary, that waste management development will only be permitted where there would not be an unacceptable risk of flooding, surface water run off or interference with flood defences.

WLP Policy W4B (Water Pollution) requires that waste management development will only be permitted where there would not be an unacceptable risk to the quality of surface and groundwaters or of impediment to groundwater flow.

A Flood Risk Assessment has been included with the application. It identifies the site as located within Flood Zone 1 – the low probability flood zone which is suitable for all types of development.

Surface water would be discharged from site at an appropriately attenuated rate. Water from the vehicle washdown area would be discharged via a package treatment plant or to the foul sewer.

Foul water is proposed to be discharged to the foul sewer to the east in Winsford Way because the site falls in this direction.

The FRA concludes that there would be no increase in flood risk to others caused by the development of the site.

The Environment Agency has raised no objection subject to conditions relating to the submission of a surface water drainage scheme and details of a suitable method of foul drainage. This is because the Environment Agency considers it is unlikely that a package treatment plant would be agreed as part of the Environmental Permit due to the presence of the main sewer network. It is considered that such conditions could be imposed in the event that permission is

granted.

It is therefore considered that the development would comply with WLP Policies W4A and W4B.

H ECOLOGICAL IMPACT

WLP Policy W10E (Development Control Criteria) permits waste management development where satisfactory provision is made in respect of the effect of the development on nature conservation.

The site has no formal ecological designation.

A Preliminary Ecological Assessment has been carried out which concluded:

- a survey of potential breeding ponds for Great Crested Newts should be carried out,
- a survey for reptiles should be carried out,
- clearance of trees and shrubs should be done outside of the bird nesting season unless a prior survey has confirmed no active nests,
- No badger setts were found but precautionary measures are recommended,
- Care should be taken not to harm other BAP species such as hedgehogs.

Accordingly, a protected species survey was undertaken for Great Crested Newts and Reptiles. No evidence of either species was found and no further recommendations were made.

The County Council's Ecologist has no objection subject to the imposition of conditions relating to:

- The assessment of the presence of invertebrates,
- Adherence to the recommendations in the Preliminary Ecological Assessment,
- Protection of existing habitats to be retained during construction,
- A landscape scheme incorporating biodiversity,
- A scheme of management and long term monitoring of new habitats,
- No removal of vegetation during the bird nesting season,
- A revised ecological assessment should commencement be delayed by more than 3 years,

and an informative requiring works to stop should Great Crested Newts or reptiles be found during construction.

In addition, the Waste Disposal Authority has registered the scheme with the Environmental Bank and fully supports the concept of Biodiversity Offsetting.

It is therefore considered that, subject to the imposition of suitably worded conditions, the development would have no significant impact on ecology and would comply with WLP Policy W10E.

7. CONCLUSION

In conclusion, it is considered that a need has been proven for the proposed waste transfer station in accordance with WLP Policy W3C. It would assist Essex County Council in reducing the amount of waste deposited at landfill in accordance with the Joint Municipal Waste Management Strategy and in compliance with WLP Policies W6A and W3A.

In principle, it is considered that the development would be appropriately located within an Employment Area in compliance with CCS Policy DC52 and WLP Policy W7E. Further, the sites identified in Schedule 1 of the WLP have been shown to be less suitable than the proposal site and the criteria stipulated in WLP Policy W8A are considered to have been complied with. The development is therefore considered to comply with WLP Policy W8B.

Given the length of time that the site has been vacant the current economic climate it is considered that there is little reasonable expectation of the site being used for B-Class use. The proposed development would be of significant benefit to the Chelmsford and Maldon areas and therefore complies with CCS Policy DC48 and the relevant section of the NPPF.

The original agricultural setting of the Grade II Listed Sheepcotes Cottages has already been altered with the construction of the A12 and the surrounding Employment Area. The construction of the waste transfer site would not be considered to have any further significant detrimental impact and no objection has been raised by the Historic Buildings Advisor. It is therefore considered that the proposed development would comply with the provisions of the NPPF and WLP Policy W10E.

The proposed location, design and layout of the development would be considered to be sympathetic to the surrounding context and to protect the amenity and health of the surrounding residents and businesses as far as possible, in compliance with WLP Policy W10E and CCS Policies CP20, CP21, DC45, CP13, DC4 and DC29. A condition to restrict working hours to that proposed within the application is considered appropriate and would ensure compliance with WLP Policy W10F.

The application has shown that the development would generate just 4 vehicles during the local network morning peak and 2 vehicles during the afternoon peak. The peak traffic generation for the development would be 49 movements and this would not coincide with the local highway network peak times. Given that the impact on the highway network would be minimal and there has been no objection from the Highway Authority, subject to conditions, it is considered that the development would comply with WLP Policies W10E and W4C.

There would be no increase in flood risk to others caused by the development of the site and the Environment Agency has confirmed no objection, subject to conditions. Therefore the development would be considered to comply with WLP Policies W4A and W4B.

The development of the proposed site would have no impact on protected species. However, the applicant has committed to the Biodiversity Offsetting Scheme to ensure that any impacts to ecology would be compensated for. The County Council's Ecologist has raised no objection, subject to conditions, and the development is therefore considered to comply with WLP Policy W10E.

Thus, the economic, social and environmental strands of the NPPF are considered to have been achieved equally and the waste transfer station would be considered to constitute 'sustainable development' in accordance with the NPPF and CCS Policy CP1.

Furthermore, the WLP policies relied upon in this report are considered to be consistent with the NPPF and therefore approval of the application is recommended subject to the imposition of appropriate conditions as permitted by WLP Policy W10A (Planning Conditions and Obligations).

8. **RECOMMENDED**

That planning permission be **granted** subject to conditions covering the following matters:

1. COM1 – Commencement within 5 years.

2. COM3 - Compliance with submitted details.

3. HOUR3 – Hours of operation

    - 0600 hours – 2000 hours Monday to Friday
    - 0800 hours – 1600 hours Saturdays and Sundays and Bank/Public Holidays.

4. Construction hours:

    - 0800 hours – 1800 hours Monday to Friday
    - 0800 hours – 1600 hours Saturdays
    - No working on Sundays or Bank/Public Holidays.

5. Doors to be closed except to allow vehicular access.

6. NSE1 – Noise Limits (47dB).

7. NSE3 – Monitoring Noise Levels.

8. WAST1 – Waste Type Restriction.

9. WAST7 – Essex and Southend-on-Sea's Waste Only.

10. Waste tonnage restriction of 90,000 tpa.

11. ECO1 – Acceptable survey and mitigation plan – implementation of Preliminary Ecological Assessment recommendations.

12. CO4 – Habitat Creation Scheme.

13. ECO6 – Survey for Invertebrates before Commencement of Development.

14. ECO5 – Habitat Management Plan.

15. Protection of retained habitats during construction.

16. ECO3 – Protection of Breeding Birds.

17. ECO7 – Update of Survey before Commencement of Development.

18. LAND1 – Landscape Scheme (including retention of planting up to the visibility splay on Winsford Way).

19. LAND2 – Replacement Landscaping.

20. All tree works and tree protection measures to be implemented in accordance with the Tree Report.

21. POLL1 - Surface Water Drainage.

22. POLL1 – Foul Water Drainage.

23. HIGH1 – Site Access Road (Constructed First).

24. HIGH14 – Gates.

25. HIGH10 -Visibility Splays.

26. HIGH14 – Surface Water.

27. HIGH16 – Loading/Unloading.

28. Construction management plan including construction vehicle routes and hours of deliveries to be submitted prior to commencement of development.

29. HIGH4 – Prevention of Mud and Debris on Highway (Alternative). Facilities to be segregated from pedestrian users.

30. DET1 – Details of External Appearance of Boundary Treatments.

31. DET5 – Office and Substation Building Design and Construction .

BACKGROUND PAPERS

Consultation replies
Representations

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

The proposed development would not be located adjacent to/within the screening distance to a European site.

Therefore, it is considered that an Appropriate Assessment under Regulation 61 of The Conservation of Habitats and Species Regulations 2010 is not required.

EQUALITIES IMPACT ASSESSMENT

The report only concerns the determination of an application for planning permission and takes into account any equalities implications. The recommendation has been made after consideration of the application and supporting documents, the development plan, government policy and guidance, representations and all other material planning considerations as detailed in the body of the report.

STATEMENT OF HOW THE LOCAL AUTHORITY HAS WORKED WITH THE APPLICANT IN A POSITIVE AND PROACTIVE MANNER

The Waste Planning Authority has participated in pre-application engagement with the developer and other consultees for some time prior to the submission of the planning application, offering advice where appropriate to assist in the application process. The community engagement process was also overseen in accordance with Essex County Council's Adopted Statement of Community Involvement.

Throughout the determination of the application, the Waste Planning Authority has liaised with the applicant to resolve issues arising from the consultation process and to reach an appropriate resolution.

LOCAL MEMBER NOTIFICATION

CHELMSFORD – Chelmer.

APPENDIX 1

Consideration of consistency of Policies

Ref: PPS10	Policy	Consistency with NPPF and
W3A	The WPAs will: In determining planning applications and in all consideration of waste management, proposals have regard to the following principles: • Consistency with the goals and	Paragraph 6 of the NPPF sets out that the purpose of the planning system is to contribute to the achievement of sustainable development. PPS10 supersedes 'BPEO'.

	principles of sustainable development; • Whether the proposal represents the best practicable environmental option for the particular waste stream and at that location; • Whether the proposal would conflict with other options further up the waste hierarchy; • Conformity with the proximity principle. In considering proposals for managing waste and in working with the WDAs, WCAs and industrial and commercial organisations, promote waste reduction, re-use of waste, waste recycling/composting, energy recovery from waste and waste disposal in that order of priority. Identify specific locations and areas of search for waste management facilities, planning criteria for the location of additional facilities, and existing and potential landfill sites, which together enable adequate provision to be made for Essex, Southend and regional waste management needs as defined in policies W3B and W3C.	PPS10 advocates the movement of the management of waste up the waste hierarchy in order to break the link between economic growth and the environmental impact of waste. One of the key planning objectives is also to help secure the recovery or disposal of waste without endangering human health and without harming the environment, and enable waste to be disposed of in one of the nearest appropriate installations. See reasoning for Policy W8A. Therefore, Policy W3A is considered to be consistent with the NPPF and PPS10.
W3C	Subject to policy W3B, in the case of landfill and to policy W5A in the case of special wastes, significant waste management developments (with a capacity over 25,000 tonnes per annum) will only be permitted when a need for the facility (in accordance with the principles established in policy W3A) has been demonstrated for waste arising in Essex and Southend. In the case of non-landfill proposal with an annual capacity over 50,000 tonnes per annum, restrictions will be imposed, as part of any planning permission granted, to restrict the source of waste to that arising in the Plan area. Exceptions may be made in the following circumstances: • Where the proposal would achieve other benefits that would outweigh	Paragraph 3 of PPS 10 highlights the key planning objectives for all waste planning authorities (WPA). WPA's should, to the extent appropriate to their responsibilities, prepare and deliver planning strategies one of which is to help implement the national waste strategy, and supporting targets, are consistent with obligations required under European legislation and support and complement other guidance and legal controls such as those set out in the Waste Management Licensing Regulations 1994. Therefore, as Policy W3C is concerned with identifying the

	any harm caused; • Where meeting a cross-boundary need would satisfy the proximity principle and be mutually acceptable to both WPA5; • In the case of landfill, where it is shown to be necessary to achieve satisfactory restoration.	amount of waste treated and it source the policy is considered consistent with the requirements of PPS10.
W4A	Waste management development will only be permitted where: • There would not be an unacceptable risk of flooding on site or elsewhere as a result of impediment to the flow or storage of surface water; • There would not be an adverse effect on the water environment as a result of surface water run-off; • Existing and proposed flood defences are protected and there is no interference with the ability of responsible bodies to carry out flood defence works and maintenance.	Paragraph 99 of the NPPF states that 'Local Plans should take account of climate change over the longer term, including factors such as flood risk, coastal change, water supply and changes to biodiversity and landscape. New development should be planned to avoid increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures, including through the planning of green infrastructure'. In addition Annex E of PPS10 highlights at section *a*. *protection of water resources* that 'Considerations will include the proximity of vulnerable surface and groundwater. For landfill or land-raising, geological conditions and the behaviour of surface water and groundwater should be assessed both for the site under consideration and the surrounding area. The suitability of locations subject to flooding will also need particular care'. Therefore, as policy W4A seeks to only permit development that would not have an adverse impact upon the local environment through flooding and seeks developments to make adequate provision for surface water run-off the policy is in conformity with PPS10 and the NPPF.

W4B	Waste management development will only be permitted where there would not be an unacceptable risk to the quality of surface and groundwaters or of impediment to groundwater flow.	See above.
W4C	1. Access for waste management sites will normally be by a short length of existing road to the main highway network consisting of regional routes and county/urban distributors identified in the Structure Plan, via a suitable existing junction, improved if required, to the satisfaction of the highway authority. 2. Exceptionally, proposals for new access direct to the main highway network may be accepted where no opportunity exists for using a suitable existing access or junction, and where it can be constructed in accordance with the County Council's highway standards. 3. Where access to the main highway network is not feasible, access onto another road before gaining access onto the network may be accepted if, in the opinion of the WPA having regard to the scale of development, the capacity of the road is adequate and there would be no undue impact on road safety or the environment. 4. Proposals for rail or water transport of waste will be encouraged, subject to compliance with other policies of this plan.	Paragraph 21 (i) of PPS10 highlights that when assessing the suitability of development the capacity of existing and potential transport infrastructure to support the sustainable movement of waste, and products arising from resource recovery, seeking when practicable and beneficial to use modes other than road transport. Furthermore, Paragraph 34 of the NPPF states that 'Decisions should ensure developments that generate significant movement are located where the need to travel will be minimised and the use of sustainable transport modes can be maximised'. Policy W4C is in conformity with paragraph 34 in that it seeks to locate development within areas that can accommodate the level of traffic proposed. In addition the policy seeks to assess the existing road networks therefore, being in accordance with the NPPF and PPS10.
W6A	The WPAs will seek to work with WDAS/WCAS to support and promote public, private and voluntary sector initiatives to reduce, re-use and recycle waste arisings in an environmentally acceptable manner in accordance with the policies within this Plan.	PPS 10 at paragraph 3 highlights the key planning objectives for waste management development. two of the objectives are as follows; – Help deliver sustainable development through driving waste management up the waste hierarchy, addressing waste as a resource and looking to disposal as the last

		option, but one which must be adequately catered for; – Provide a framework in which communities take more responsibility for their ownwaste, and enable sufficient and timely provision of waste management facilities to meet the needs of their communities. Therefore, policy W6A is in conformity with the requirements of PPS10.
W7E	To facilitate the efficient collection and recovery of materials from the waste stream, in accordance with policy W3A, the WPAs will seek to work with the WDAs/WCAs to facilitate the provision of: • Development associated with the source separation of wastes; • Material recovery facilities (MRF's); • Waste recycling centres; • Civic amenity sites; • Bulking-up facilities and waste transfer stations. Proposals for such development will be supported at the following locations: • The waste management locations identified in Schedule 1 (subject to policy W8A); • Other locations (subject to policies W8B and W8C); • In association with other waste management development; • Small scale facilities may be permitted at current landfill sites, provided the development does not unduly prejudice the agreed restoration timescale for the site and the use ceases prior to the permitted completion date of the site (unless an extension of time to retain such facilities is permitted). Provided the development complies with	See explanation notes for Policy W3C, W8A and W8B as these are relevant and demonstrate conformity with the NPPF and PPS10.

	other relevant policies of this plan.	
W8A	Waste management facilities will be permitted at the locations shown in Schedule 1 provided all of the following criteria, where relevant, are complied with: • There is a need for the facility to manage waste arising in Essex and Southend (subject to policy W3C); • The proposal represents the Best Practicable Environmental Option (BPEO) for the particular waste stream, having regard to any alternative options further up the waste hierarchy; • The development complies with other relevant policies of this Plan, including the policy/ies in Chapter 7 for the type(s) of facility proposed; • Adequate road access is provided in accordance with policy W4C. Access by rail or water will be supported if practicable; • Buildings and structures are of a high standard of design, with landscaping and screening provided as necessary; and • Integrated schemes for recycling, composting, materials recovery and energy recovery from waste will be supported, where this is shown to provide benefits in the management of waste which would not otherwise be obtained.	PPS10 at paragraph 17 indentifies that 'Waste planning authorities should identify in development plan documents sites and areas suitable for new or enhanced waste management facilities for the waste management needs of their areas. Waste planning authorities should in particular: – allocate sites to support the pattern of waste management facilities set out in the RSS in accordance with the broad locations identified in the RSS; and, – allocate sites and areas suitable for new or enhanced waste management facilities to support the apportionment set out in the RSS. The WPA has identified sites within the Waste Local Plan under policy W8A which seek to support the pattern of waste management and that are suitable for new or enhanced waste management facilities. Therefore, the policy is in conformity with the requirements of the PPS10.
W8B	Waste management facilities (except landfill to which policies W9A and W9B apply) will be permitted at locations other than those identified in this plan, provided all of the criteria of policy W8A are complied with where relevant, at the following types of location: • Existing general industrial areas; • Areas allocated for general industrial use in an adopted local plan; • Employment areas (existing or allocated) not falling into the above	Policy W8B is concerned with identifying locations for sites that have not been indentified within the Plan as preferred sites of waste related developments. By setting a criteria for non-preferred sites this allows for the protection of the natural environment in conformity with the third strand of the three dimensions of sustainable development. Additionally, in conformity with paragraph 17 of the NPPF, the policy contributes to the

	categories, or existing waste management sites, or areas of degraded, contaminated or derelict land where it is shown that the proposed facility would not be detrimental to the amenity of any nearby residential area. Large-scale waste management development (of the order of 50,000 tonnes per annum capacity or more, combined in the case of an integrated facility) will not be permitted at such non-identified locations unless it is shown that the locations identified in Schedule 1 are less suitable or not available for the particular waste stream(s) which the proposal would serve.	conservation and enhancement of the natural environment. The NPPF goes on to state that 'Allocations of land for development should prefer land of lesser environmental value, where consistent with other policies in this Framework.
W10A	When granting planning permission for waste management facilities, the WPA will impose conditions and/or enter into legal agreements as appropriate to ensure that the site is operated in a manner acceptable to the WPA and that the development is undertaken in accordance with the approved details.	PPS10 states that 'It should not be necessary to use planning conditions to control the pollution aspects of a waste management facility where the facility requires a permit from the pollution control authority. In some cases, however, it may be appropriate to use planning conditions to control other aspects of the development. For example, planning conditions could be used in respect of transport modes, the hours of operation where these may have an impact on neighbouring land use, landscaping, plant and buildings, the timescale of the operations, and impacts such as noise, vibrations, odour, and dust from certain phases of the development such as demolition and construction'. Furthermore, paragraph 203 of the NPPF states that 'Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations

		should only be used where it is not possible to address unacceptable impacts through a planning condition'. Policy W10A inter alia only seeks to impose conditions and/or enter into legal agreements when appropriate to ensure that the site is operated in an acceptable manner. Therefore, the policy is in accordance with the requirements of the NPPF and PPS10.
W10E	Waste management development, including landfill, will be permitted where satisfactory provision is made in respect of the following criteria, provided the development complies with other policies of this plan: 1. The effect of the development on the amenity of neighbouring occupiers, particularly from noise, smell, dust and other potential pollutants (the factors listed in paragraph 10.12 will be taken into account); 2. The effect of the development on the landscape and the countryside, particularly in the AONB, the community forest and areas with special landscape designations; 3. The impact of road traffic generated by the development on the highway network (see also policy W4C); 4. The availability of different transport modes; 5. The loss of land of agricultural grades 1, 2 or 3a; 6. The effect of the development on historic and archaeological sites; 7. The availability of adequate water supplies and the effect of the development on land drainage; 8. The effect of the development on nature conservation, particularly on or near SSSI or land with other ecological or wildlife designations;	Policy W10E is in conformity with the NPPF in that the policy is concerned with the protection of the environment and plays a pivotal role for the County Council in ensuring the protection and enhancement of the natural, built and historic environment. The policy therefore, is linked to the third dimension of sustainable development in the meaning of the NPPF.

	and 9. In the Metropolitan Green Belt, the effect of the development on the purposes of the Green Belt.	
W10F	Where appropriate the WPA will impose a condition restricting hours of operation on waste management facilities having regard to local amenity and the nature of the operation.	In addition Paragraph 123 of the NPPF states that planning decisions should aim to mitigate and reduce to a minimum other adverse impacts on health and quality of life arising from noise from new developments, including through the use of conditions. Furthermore, paragraph 203 states that local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. It is considered that as policy W10F is concerned with the protection of amenity and seeks to impose conditions to minimise this policy W10F is in conformity with the requirements of the NPPF. Also see above regarding PPS10 and conditions.

AGENDA ITEM .....5b.....

DR/02/13

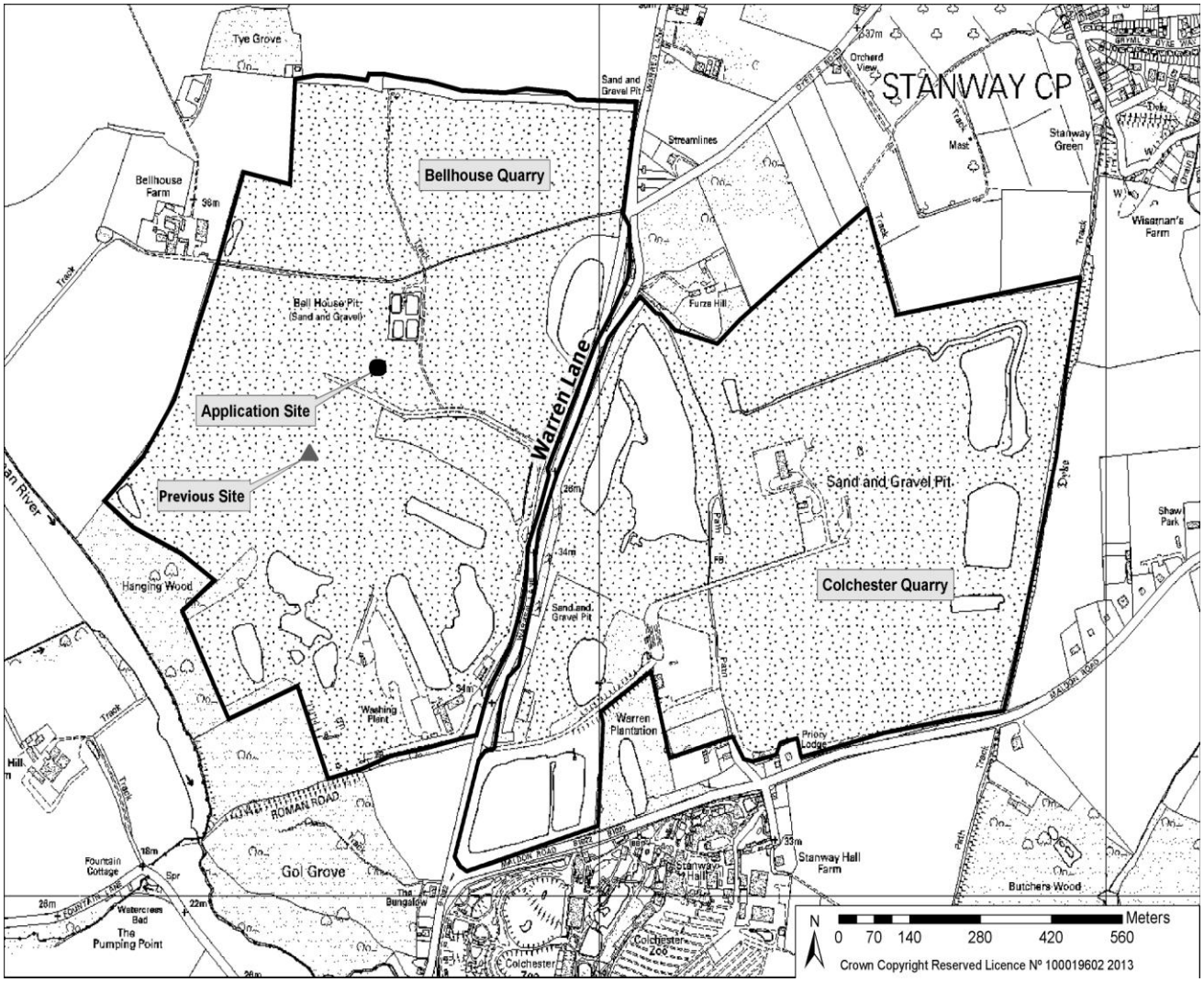
committee DEVELOPMENT & REGULATION

date 25 January 2012

MINERALS AND WASTE DEVELOPMENT
The relocation of a 2000 SCMH flare within the Bellhouse Landfill Site for a temporary period not exceeding 9 months.
Bellhouse Landfill, Warren Lane, Stanway, Colchester, CO3 0NN.
Ref: ESS/62/12/COL

Report by Assistant Director of Sustainable Environment and Enterprise

Enquiries to: Shelley Bailey Tel: 01245 437577



1. BACKGROUND

The Bellhouse site is currently being landfilled under planning permission ref ESS/07/01/COL/REV.

Planning permission ref ESS/31/11/COL was granted on 12 August 2011 for the installation of an environmental flare within the site for a temporary period of 12 months. The flare was required to assist in the control of landfill gas.

The time limit for removal was extended to 25 October 2013 through permission ref ESS/53/12/COL.

Other planning permissions relevant to this proposal include permission refs ESS/24/00/COL, granted in 2004, ESS/09/12/COL, granted on 12 June 2012 and ESS/09/12/COL/NMA granted 20 September 2012. Together, these permissions allow the installation of a compound on the eastern side of Warren Lane to utilise landfill gas from the Bellhouse site for electricity generation as well as a flare.

2. SITE

The application site is located to the west of Warren Lane within the existing landfill area. It is located approximately 130m to the north east of the flare location originally permitted by permission ref ESS/31/11/COL.

The nearest property is located at Bellhouse Farm, approximately 400m to the north west of the proposal site, and adjacent to the western edge of the landfill. The farmhouse itself and two associated barns are Grade 2 Listed Buildings.

Footpath 15 Stanway runs in an east to west direction approximately 200m to the north of the application site.

3. PROPOSAL

The application is for the relocation of the gas flare originally permitted under ref ESS/31/11/COL to an area approximately 130m to the north east. The application site is still within the Bellhouse Landfill site.

Associated with the 8.4m high flare would be a base slab, diesel storage tank (to hold diesel used to power a generator) and ancillary equipment situated within a compound 5m x 11m in size surrounded by a 2.4m high security fence.

The applicant has stated that the relocation of the flare would allow the current location to be landfilled during the winter months.

The applicant has requested a temporary permission period of 9 months. This would allow for the upgrading works permitted at the gas compound on the east of Warren Lane to be carried out. The operational capacity of the proposed flare would then be taken up by the main plant in the compound on a permanent basis.

It is noted that, on 13th November 2012, the gas flare was moved from the location

originally permitted under permission ref ESS/31/11/COL to the proposed location prior to the determination of the planning application. The question of the appropriateness of enforcement action will be assessed further in the report.

4. POLICIES

The following policies of the Essex and Southend Waste Local Plan (WLP), Adopted 2001, The Colchester Local Development Framework (Colchester Core Strategy, (CCS), Adopted December 2008, the Colchester Development Policies (CDP), Adopted October 2010, and the Colchester Site Allocations, (CSA), Adopted October 2010), provide the development plan framework for this application. The following policies are of relevance to this application:

	WLP	CDP	CCS
Development Control Criteria	W10E		
Historic Environment Assets		DP14	
Retention of Open Space and Indoor Sports Facilities/Open Space		DP15	PR1

It is noted that, as of 03 January 2013, the Regional Spatial Strategy for the East of England (RSS) has been revoked and therefore no longer forms part of the development plan.

The National Planning Policy Framework (NPPF), published in March 2012, sets out requirements for the determination of planning applications and is also a material consideration. It does not contain specific policies on waste, since national waste planning policy will be set out in the future National Waste Management Plan. In the meantime, Planning Policy Statement 10: Planning for Sustainable Waste Management, remains a material consideration in planning decisions.

Paragraph 214 of the NPPF states that, for 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with the Framework.

The Colchester Borough Council Local Development Policies, Adopted December 2008 and October 2010, are considered to fall into paragraph 214.

Paragraph 215 of the NPPF states, in summary, that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework.

The policies within the Essex and Southend Waste Local Plan are considered to fall into paragraph 215. Therefore, the level of consistency of those policies with the NPPF will be considered further in the report.

5. CONSULTATIONS

COLCHESTER BOROUGH COUNCIL – No objection.

ESSEX & SUFFOLK WATER – No comments received.

NATIONAL GRID – No comments received.

ENVIRONMENT AGENCY – No objection. Comments that the flare would ensure the control of landfill gas and that the applicant has previously submitted justification to the EA for this operation. The flare would not be permanent but would be removed once the infrastructure in the compound east of Warren Lane has been installed.

THE COUNTY COUNCIL'S NOISE CONSULTANT – No objection subject to the imposition of a noise limiting condition as in permission ref ESS/31/11/COL. Notes that the flare would be approximately 400m from the nearest sensitive receptor. Noise levels at this receptor would remain at around 30dB or less.

WASTE DISPOSAL AUTHORITY – No comments received.

PLACE SERVICES (Landscape) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No comments to make. Viewpoints had been previously agreed with the landscape consultant acting for the applicant.

STANWAY PARISH COUNCIL – Objects to the application and raises concern that the flare has been moved already.

LOCAL MEMBER – COLCHESTER – Stanway and Pyefleet – Requests that the application is heard at Development and Regulation Committee and comments that the County and Borough Member for Stanway have expressed their concern about the retrospective nature of the application, together with visual impact from public viewpoints including Warren Lane. Also comments that there is insufficient capacity because EDL underestimated gas levels and this could be solved by using spare capacity at the County Council's generating plant. Requests that the Committee finds a way of instructing the applicants not to submit retrospective applications and to consult with local Councillors and residents wider in future.

6. REPRESENTATIONS

No properties were directly notified of the application as there are none within the required radius. 1 letter of representation has been received. This relates to planning issues covering the following matters:

Observation	Comment
The visual impact assessment shows viewpoints when trees were in leaf. The flare can be seen from Warren Lane now that the leaves have fallen and this is distracting for traffic.	See appraisal.
The applicant underestimated gas levels and there is insufficient capacity and infrastructure to deal with it. This	Noted.

could have been resolved by using spare capacity at ECC's generating plant.	
There is lack of compliance with the working plan and phased restoration.	This matter is being dealt with separately from this planning application.

7. APPRAISAL

The key issues for consideration are:

A. Policy Considerations
B. Need
C. Retrospective Nature of the Application
D. Amenity/Landscape Impact
E. Impact on Listed Buildings

A POLICY CONSIDERATIONS

At the heart of the NPPF is a presumption in favour of sustainable development. For decision-taking, this means approving development proposals that accord with the development plan without delay, and, where the development plan is absent, silent or out of date, granting planning permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF; or specific policies in the NPPF indicate development should be restricted.

The term 'sustainable development' is given three dimensions in the NPPF which give rise to the need for the planning system to perform an economic role, a social role and an environmental role.

These roles should not be undertaken in isolation, because they are mutually dependent. Therefore, to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously. The extent to which the proposed development achieves each of these 3 roles is assessed throughout the report.

The application area is within a Minerals and Waste Safeguard Zone and an area designated for Open Space as defined by the Colchester Borough Council Proposals Map.

The principle of open space provision and protection is put forward through CCS Policy PR1 (Open Space) and CDP Policy DP15 (Retention of Open Space and Indoor Sports Facilities).

Neither of the above designations would be prejudiced by the proposals, since the gas flare is required only for a temporary period and would still allow the land to be appropriately restored.

B NEED

A temporary flare is currently required to control gas at the Bellhouse landfill site.

In general terms, landfill gas migration can result in fires, odours, damage to vegetation and the environment if not properly controlled.

The applicant has stated that the low-lying area the flare was in was required for winter tipping, and that such tipping would ensure effective litter control over the winter period by avoiding more exposed areas of the site.

The proposed location is also more readily accessible for operation and for maintenance during the winter months.

The applicant has stated that the flare would be required only until upgrading works have been completed on the compound on the eastern side of Warren Lane, and that these works are due for completion in December 2012.

However, a period of 9 months has been applied for as a contingency.

Nuisance odour can result from a lack of capacity to deal with landfill gas. Given the case put forward by the applicant and the Environment Agency's consultation response, it is considered that there is a need for the proposed development.

The appropriateness of the proposed location will be considered further in the report.

C RETROSPECTIVE NATURE OF THE APPLICATION

The applicant informed the Waste Planning Authority, the Local Ward Member and the Local County Member on 12th November 2012 of the intention to relocate the flare on 12th and 13th November 2012.

The applicant was informed by the Waste Planning Authority that planning permission was required and any further development would be carried out at the applicant's own risk of enforcement action.

A complaint was received by telephone call on 12th November 2012 from a member of the public and a site visit by the planning officer on 22nd November 2012 confirmed that the flare had been moved.

The NPPF has replaced Planning Policy Guidance 18: Enforcing Planning Control. The NPPF states:

'*Effective enforcement is important as a means of maintaining public confidence in*

the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control…'

The merits of the application and of taking enforcement action will be considered further in the report.

D AMENITY/LANDSCAPE IMPACT

The nearest sensitive receptor to the flare is Bellhouse Farm.

It is of particular note that the flare was previously located 10m below the level of the landfill site, and therefore very well hidden from view. The proposed location is sited between 41m-42m AOD compared to Bellhouse Farm which sits at approximately 36m AOD and Warren Lane which is at approximately 29m AOD.

WLP Policy W10E (Development Control) requires, in summary and among other requirements, satisfactory provision to be made in respect of the amenity of neighbouring occupiers, and in respect of the effect of the development on the landscape. These elements of the policy are considered below:

Visual

There would be no visible flame, only a clear heat haze, which it is considered reasonable to assume may be visible from Bellhouse Farm at times. However, it is considered that this would not be intrusive and the temporary nature of the development would assist in mitigating any impact. The topography of the landfill is such that the flare structure would be unlikely to be seen from Bellhouse Farm. A condition could be imposed to require the removal of the flare and compound within 9 months, as suggested by the applicant.

It is further considered that users of Footpath 15 Stanway would not be significantly affected by the installation of the proposed flare and associated development, especially considering the presence and context of the existing landfill operations.

The application notes that the flare would be of very low impact to the landscape. Various viewpoints have been assessed and the report notes that the flare would not be visible from any of them.

Having visited the site since the flare has been erected, it is noted that it can be seen from Warren Lane, most likely due to the time of year and because the existing screen vegetation is not in leaf. However, this view is a glimpsed view and, due to the location approximately 420m to the west of Warren Lane, it is not considered that this could be said to be distracting for drivers.

The flare may be able to be seen from a low number of properties located along Warren Lane directly opposite the landfill. However, given the distance between the flare and properties, and the presence of the landfill itself, it is not considered that this would have any significant impact on amenity.

Noise

The County Council's noise consultant has no objection to the proposals subject to the imposition of a noise-limiting condition. It is considered that such a condition could be imposed, in the event that permission is granted, and therefore noise would not have a significant detrimental impact on amenity.

Odour

It is further noted that the proposal is directly related to the control of odour at the site. Without the flare and prior to the installation of appropriate equipment in the compound to the east of Warren Lane there may well be odour generated which could impact on the local area.

It is therefore considered that, in respect of impact on amenity and landscape, WLP Policy W10E (Development Control) would be complied with.

E IMPACT ON LISTED BUILDINGS

WLP Policy W10E (Development Control) requires, in summary and among other requirements, satisfactory provision to be made in respect of the effect of the development on historic sites.

CDP Policy DP14 (Historic Environment Assets), in summary, does not permit development which would adversely affect a listed building.

As the flare structure would be very unlikely to be visible from Bellhouse Farm, and due to the temporary nature of the proposal, it is considered that there would be no adverse impact on the listed buildings or their setting and the development would comply with WLP Policy W10E (Development Control) and CDP Policy DP14 (Historic Environment Assets).

8. CONCLUSION

In conclusion, it is considered that the gas flare is required for the appropriate management of landfill gas and that its temporary location for a period of 9 months would not prejudice the restoration of the site or the aspirations of the Colchester Borough Council Local Development Framework policies PR1 and CDP Policy DP15.

There would be minimal impact on the landscape and visual amenity and noise could be controlled through the imposition of a condition in the event that permission is granted. The presence of the flare would act to improve amenity in terms of controlling odour, thereby complying with Waste Local Plan Policy W10E.

It is considered that the flare would not adversely affect the listed buildings at Bellhouse Farm, thereby complying with Waste Local Plan Policy W10E and Colchester Development Policies Policy DP14.

Furthermore, the relocation of the gas flare is considered to constitute 'sustainable

development' within the parameters of the NPPF due to the economic, social and environmental gains which would be achieved through the development.

It is also considered that Policy W10E is in conformity with the NPPF in that the policy is concerned with the protection of the environment and plays a pivotal role in ensuring the protection and enhancement of the natural, built and historic environment. The policy is linked to the third dimension of sustainable development in the meaning of the NPPF.

Therefore, approval of the application is recommended.

It is further concluded that the harm caused by the premature relocation of the flare was not significant, especially taking into account the recommendation to approve the application. In considering the advice regarding discretion and proportionality in the NPPF it is recommended that formal enforcement action would not be expedient in this instance.

9. RECOMMENDED

A. That planning permission be **granted** subject to conditions covering the following matters:

1. COM3 – Compliance with submitted details.
2. CESS2 – Cessation of development within 9 months of the date of permission.
3. NSE6 – Silencing of plant and machinery.
4. NSE1 – Noise limits between the hours of 0700 – 2200.

B. That it is not expedient to take enforcement action regarding the premature relocation of the gas flare.

BACKGROUND PAPERS

Consultation replies
Representation

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

The proposed development would not be located adjacent to or within the screening distance of a European site.

Therefore, it is considered that an Appropriate Assessment under Regulation 61 of The Conservation of Habitats and Species Regulations 2010 is not required.

EQUALITIES IMPACT ASSESSMENT

The report only concerns the determination of an application for planning permission and takes into account any equalities implications. The recommendation has been made after consideration of the application and supporting documents, the development plan, government policy and guidance, representations and all other material planning considerations as detailed in the

body of the report.

STATEMENT OF HOW THE LOCAL AUTHORITY HAS WORKED WITH THE APPLICANT IN A POSITIVE AND PROACTIVE MANNER

In determining this planning application, the Waste Planning Authority has worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with the planning application by liaising with consultees, respondents and the applicant/agent and discussing changes to the proposal where considered appropriate or necessary.

This approach has been taken positively and proactively in accordance with the requirement in the NPPF, as set out in the Town and Country Planning (Development Management Procedure) (England) (Amendment No.2) Order 2012.

LOCAL MEMBER NOTIFICATION

COLCHESTER – Stanway and Pyefleet

AGENDA ITEM……6a……..

DR/03/13

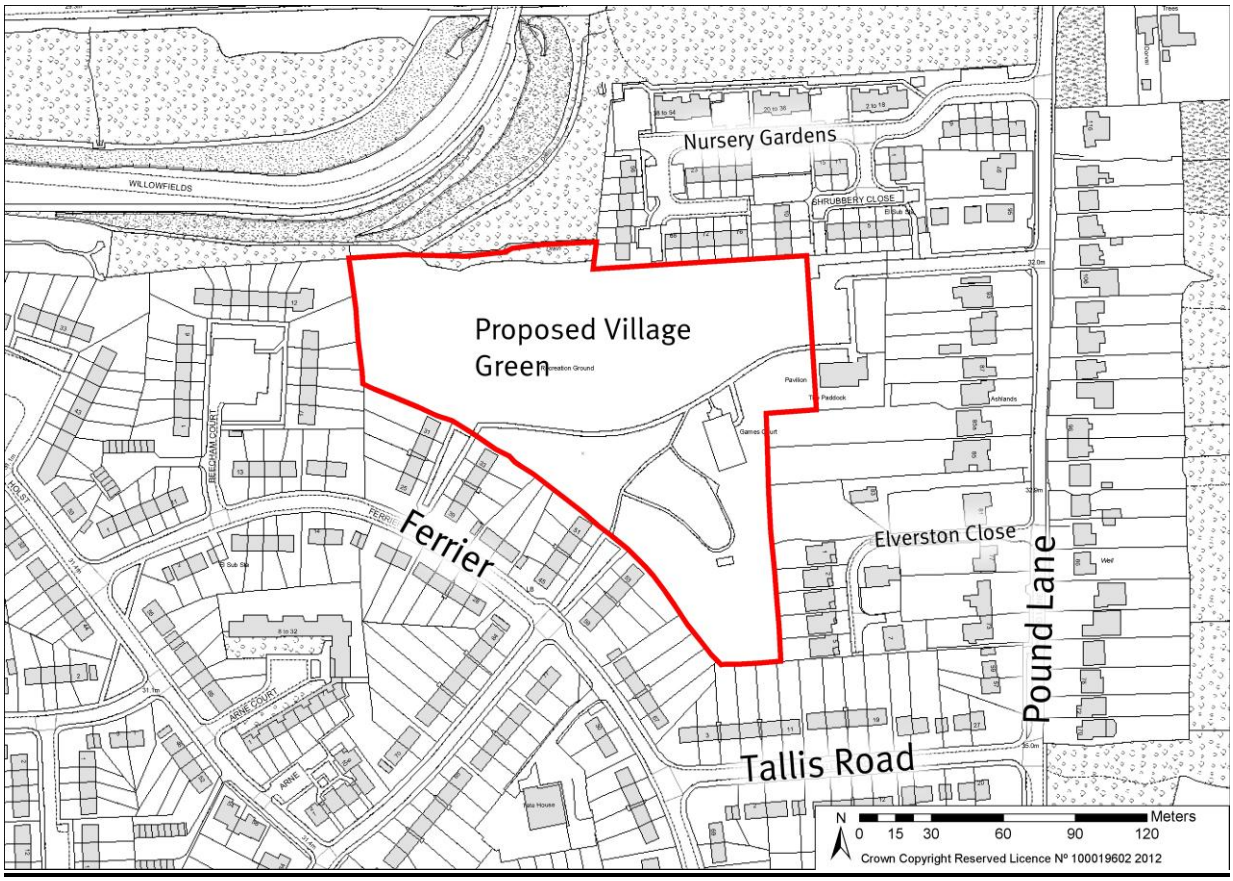
Committee DEVELOPMENT AND REGULATION

Date 25 January 2013

VILLAGE GREEN
APPLICATION TO REGISTER LAND KNOWN AS POUND LANE RECREATION GROUND, POUND LANE, LAINDON, BASILDON AS A TOWN OR VILLAGE GREEN

Report by County Solicitor

Enquiries to: Jacqueline Millward, telephone 01245 506710



1. PURPOSE OF REPORT

To consider an application made on by Mr T B Adams of 7 Elverston Close, Laindon, Basildon dated 23 August 2010 under Section 15 of the Commons Act 2006 ("the 2006 Act"), to register land at Pound Lane Recreation Ground, Laindon as a town or village green. In evidence the land was also referred to as 'The Paddocks' or 'Pounders'.

2. BACKGROUND TO THE APPLICATION

The County Council has a duty to maintain the Register of Commons and Town and Village Greens. Under Section 15 of the 2006 Act applications can be made to the County Council as commons registration authority to amend the Register to add new town or village greens.

The County Council has received an application made by local resident Mr Adams to register the application land as a Town or Village Green under the provisions of Section 15(2) of the 2006 Act. The twenty year period for the application is 1990 to 2010.

The application was advertised in the local press and on site. Notice was also served on landowners. The County Council received objections to the application from the landowner, Basildon Borough Council.

Prior to the advertisement the landowner had made representations that it had 'appropriated' the land from open space so that it could obtain planning permission and dispose of the land. The appropriation took place on 25 June 2010 for planning purposes under section 122(2A) Local Government Act 1972, including the prescribed publicity in the local press, in response to which no objections were received.

They argued that this would effectively prevent the land having village green status. The Registration Authority took counsel's advice on this issue and was advised that this was not the case so the formal advertisement of Mr Adam's village green application took place. As the appropriation came at the very end of the relevant twenty year period it does not bear on the situation for all but two months.

The application was advertised on site and in the local press in December 2010 with objections to be made no later than 28 January 2011. Direct notification was sent to the landowner identified by the applicant.

Basildon Borough Council objected on 27 January 2011. They indicated that they would in any event require the applicant to be put to proof as to the level, nature and duration of the use of the land which is claimed in his application and supporting documents to have been made and as to the proper identification of a "locality or neighbourhood within a locality" from which the users of the said land are said to have come.

The main thrust of their objection was however that the land constitutes the Pound Lane Recreation Ground, which was acquired by the Borough Council's predecessor

(Billericay Urban District Council) on various dates between 1938 and 1952, and laid out since that time, as a public park or pleasure ground under section 164 of the Public Health Act 1875, as amended.

Their objection stated that it has not been legally possible on this particular land for use 'as of right' by local inhabitants to generate by 'prescription' (i.e. 20 years use without permission) the status of town or village green. The application for registration as such should therefore be rejected.

They stated that the land concerned has also been expressly subject to byelaws.

The objection was supplemented on 25 May 2011 by a 'submission of factual position' in which the objector explained the history of the acquisition of the application land and the statutory basis for it.

In the case of village green applications the County Council as commons registration authority has a discretion whether to hold an oral hearing before confirming or rejecting the application as there is no prescribed procedure in the relevant legislation. Where there is a dispute which "is serious in nature", to use the phrase of Arden LJ in *The Queen (Whitmey) v The Commons Commissioners* [2004] EWCA Cov.951 (para 29), a commons registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry". A non-statutory public inquiry was held before Mr Alan Evans, barrister at law, between 24 and 26 July 2012. He made a report with a recommendation to be considered by the County Council as registration authority which is at Appendix 1.

3. THE APPLICATION LAND

The boundaries of the application land on the plan submitted with the application do not match the boundaries shown on the aerial photograph accompanying the required applicant's statutory declaration in support of the application. At the north east corner the boundaries on the application plan take in an area which is a tarmac surfaced car park, a community building (known as the Paddocks Community Hall) and children's play area. The applicant confirmed the boundaries on the aerial photograph were to be taken as the correct boundaries of the application land i.e. the lesser area.

It is accessible from the car park off Pound Lane. There is a tarmac surfaced path from Kathleen Ferrier Crescent. There is an informal and unsurfaced path from Willowfield. There is a passageway for foot access to Nursery Gardens. There is lighting on some of the paths across the application land and benches and bins for litter and dog waste are provided.

The area is an irregular shape, mainly grassed and has the appearance of a modest public park. It is bounded by adjacent residential properties. The boundaries are largely marked by mature trees and vegetation although less so on the south west boundary. There are trees along the line of the east-west footpath and small groups of trees inside the western boundary and in its north east and south east corners.

On the eastern side of the application land there is a small multi use games area ("MUGA"), hard surfaced and enclosed by a mesh fence with unrestricted access points. The MUGA is equipped with goal posts and basketball hoops. In the eastern half of the application land there is a pair of football goalposts.

At the time of the inspector's unaccompanied site visit there were no notices on the application land but workmen were in the process of installing a byelaws notice where the east-west footpath leads off from the car park and a metal bollard preventing vehicular access.

4. DEFINITION OF A TOWN OR VILLAGE GREEN

The grounds for the registration of greens are now contained in the Commons Act 2006, section 15. Section 15 provides that any person may apply to the Registration Authority to register land as a town or village green in a case where the following requirements applies:- where (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application. It is for the applicant to establish that these criteria are satisfied in relation to the area claimed in their application.

In determining the period of 20 years referred to there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment and the use is to be regarded as continuing and in appropriate cases where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

5. THE APPLICATION AND EVIDENCE IN SUPPORT OF THE APPLICATION

The evidence in support of the application is summarised at paragraphs 27-37 at pages 9 – 12 of the inspector's report in Appendix 1.

Evidence was given at the inquiry by five witnesses: Valerie Kingsley (paragraph 27), Frances Livesey (paragraph 28), Christine Finch (paragraph 29), Jeanette Overy (paragraph 30) and Michael Marchant (paragraphs 31 – 34).

User evidence included Brownies/Guides events, playing ball games, picnics, with dogs including dog walking, rounders, cricket, football. There had been two ponds on the application land which had been filled in. The Kathleen Ferrier estate had been built from the early 1960s and use of the application land increased as the estate was built up. The grass had been cut. The witnesses didn't identify any byelaw signs.

One witness, Mr Marchant, produced some additional material. There was a map accompanying the Basildon Town (Designation) Order 1949 and a large scale map of Laindon dating from 1978 on which the legend 'recreation ground' appears in the

location of the application land. Mr Marchant also explained how the MUGA came about in 2006 (see paragraph 32 of the inspector's report).

Additional material was included in the applicant's inquiry bundle; 16 completed evidence questionnaires, five witness statements, various photographs, and extracts from Basildon District Council PPG17 Open Space Assessment 2010.

The applicant made submissions that land held by local authorities for open space or recreational purposes was not exempt from registration as a village green and the objector had produced no evidence to demonstrate residents had been informed of the status of the application land or its regulation by byelaws. In the 2010 Open Space Assessment the application land was classified as 'amenity green space' of which the example was 'village greens and ponds'.

6. EVIDENCE IN SUPPORT OF THE OBJECTION TO THE APPLICATION

Basildon Borough Council called two witnesses at the inquiry.

Mr Topsfield's evidence is dealt with in paragraphs 39-46 of the inspector's report and Mr Reynolds' evidence at paragraphs 47-50 of the inspector's report.

Mr Topsfield confirmed the land had been acquired by the Urban District Council of Billericay on various dates between 1938 and 1952. The main part was acquired in 1938. The purpose of the acquisitions was for open space and recreation and the intention was that the acquired land be used by the public as an amenity. Reference was made to a minute of the Urban District Council to acquire land under 'section 69 of the Public Health Act, 1925' although the recommendation provided that 'the section under which the land is to be acquired be determined on the merits of each particular case'.

Five plots acquired in 1938 and 1939 were recorded in the Borough Council's terrier record as being for the purpose of 'Pound Lane Public Open Space' and the statute stated was 'Public Health Act 1875-1925. The last acquisition of a small part of the application land in its south east corner in 1952 was stated to be for 'housing' and the statute stated was 'Housing Act 1936'.

The application land has been laid out for recreation since approximately the 1960s and it was believed use commenced shortly after the development of the adjoining Council housing estate which was in the late 1950s and early 1960s.

Mr Reynolds gave evidence of the operational management of the land and confirmed that it was an area for informal activities and various amenities had been provided. Grass cutting, pruning and litter picking had been carried out. Byelaws had been made in 1997 under section 164 Public Health Act 1875, section 15 Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906 with respect to pleasure grounds and open spaces. A previous set of byelaws in 1979 did not appear to apply to the application land.

The objector made submissions that the applicant's plans of the claimed locality and claimed neighbourhood were hopelessly inappropriate to meet the statutory criteria.

Laindon Park Ward had been suggested but not relied on and was in any event too large to be neighbourhood and had only existed since 2001 so was not suitable as a locality. The objector considered the plan of the locality with the original application would represent a potential neighbourhood but there had been no exercise to match this area to the evidence of use.

The objector accepted that there had been 20 years use from 1990 to 2010 but the key issue was whether use had been 'as of right' or 'by right' and that the application land could not have been used 'as of right' as it was made available 'by right' as a public park or recreation ground for the whole of the relevant twenty year period. The making of byelaws corroborates the nature of the use as being by virtue of a statutory right. Use in breach of byelaws could not be lawful use in accordance with the decision in the *Newhaven Port and Properties* case in 2012.

Whilst the Borough Council would expect to argue that these were 1906 Act public open space acquisitions the proper inference of the evidence at the time of the acquisitions was that the acquisitions were under section 164 Public Heath Act 1875. If that were the case, the public's use of the land had undoubtedly been 'by right' ever since. In relation to the one acquisition under the Housing Act 1936, the statutory housing power included a power to provide and maintain a recreation ground and the land in fact been laid out as part of the park/open space to the extent it fell within the boundary of the application land. This had also been the position in the 2011 case of *Barkas v North Yorkshire County Council* where it was held that use by local people was 'by right' and not 'as of right'.

7. INSPECTOR'S FINDINGS

The inspector's findings and analysis are set out in paragraphs 62-114 (pages 21 to 44) of the inspector's report at Appendix 1. The relevant issues for consideration are:

a. Has the use been for lawful sports and pastimes?
b. Has there been 20 years of such use?
c. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?
d. Has the user by inhabitants been as of right?

The key issue in this case as raised by the objector is whether use of the application land has been 'as of right'.

<u>Has the use of the application land been for lawful sports and pastimes for at least 20 years?</u>

The inspector considered that the whole of the application land has been used for lawful sports and pastimes for the relevant 20 year period and he so found. The evidence in support of the application, both oral and written, is sufficient to establish as much. The Borough Council as landowner and objector had not sought to suggest otherwise.

Has there been use by a significant number of inhabitants of any neighbourhood within a locality?

The applicant had framed his application on the basis of limb (ii) that is, use is by a significant number of the inhabitants of any neighbourhood within a locality rather than under limb (i), that the use is by a significant number of the inhabitants of any locality. The neighbourhood put forward by the applicant at the inquiry is the truncated area on the map at Appendix 2. The locality put forward by the applicant at the inquiry is the larger area delineated on the map at Appendix 2.

The inspector considered the nature of a neighbourhood from the relevant case law in paragraphs 66 to 72 of his report at Appendix 1 and considered how the case law applied to this application at paragraphs 73 to 80 of his report.

The inspector did not find that the neighbourhood identified by the applicant constitutes a neighbourhood for the purposes of the 2006 Act as it was no more than an area which the applicant and Mr Marchant had chosen to delineate on the plan. There was no evidence on necessary cohesiveness. Nor was it demonstrated that there had been use of the application land by a significant number of inhabitants of the area identified as the neighbourhood. The addresses of those who provided evidence of use was restricted to seven or so streets close to the application land. It was not therefore possible to make any reliable assumptions or reach property conclusions about use of the application land by other users from elsewhere in the absence of evidence to demonstrate the same, a principle which had received judicial interpretation in *McAlpine Homes Ltd v Staffordshire County Council* [2002] where Sullivan J said that "the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers". In the *McAlpine Homes* case the inspector found that users had come from all parts of the relevant locality.

The inspector also considered it a matter of principle, so as to not render the relevance of neighbourhood meaningless, that users came from all over the relevant locality/neighbourhood. It might well be that one would expect to see most users of the claimed green coming from those houses closest to it and that one would not expect to see an equal spread from all over the area, however he considered that if users are confined to a limited part and there is an absence of evidence of use by inhabitants of large parts of the qualifying area, the requirement is not made out. He found that this is the situation in relation to Mr Adams' application. That being the case, the application must fail on the basis that the applicant had not put forward a neighbourhood which can be relied on for the purposes of the 2006 Act and, even if that were wrong, it had not been demonstrated that use of the application land has been by a significant number of the inhabitants of the neighbourhood.

Whilst the inspector did not consider that it was for the registration authority to make out the applicant's case he did not consider in any event that the application was sustainable on treating the wider area on Appendix 2 as a neighbourhood with a wider unspecified locality. This was because the argument on spread of users would equally fail. He also considered whether the applicant could succeed under limb (i) instead of limb (ii), but this also fell foul of the requirements as a limb (i) case would

need to be an area known to the law or with legally significant boundaries, which this was not.

Has the user by inhabitants been as of right?

Given the focus of the objector's case, although the inspector had found that the application was fatally flawed in relation to the necessary locality and neighbourhood criteria, he considered the question of the nature of the rights established by the use that had taken place. The objector claims that none of the use can be 'as of right' because it has been 'by right'.

The inspector considered that the issue of whether use has been 'as of right' is inextricably bound up with the question of the power under which the application land was acquired and held. As a local authority is a creature of statute it can only acquire land under some statutory power. He considered the relevant documentary material in relation to the main part of the application land acquired in 1938-39 in paragraphs 84 to 90 (pages 31 to 34) of his report and in relation to the parcel in the south east corner acquired in 1952 in paragraphs 91 to 92 (pages 34 to 35) of his report at Appendix 1.

He found that the main part of the application land acquired in 1938-39 was acquired under section 164 of the Public Health Act 1875 and the remainder of the land acquired in 1952 under section 79(1)(a) of the Housing Act 1936.

Well established case law determined that the public have a right to the use of land which a local authority has acquired and made available to the public under section 164 of the Public Health Act 1875. This would apply to the major part of the site. The recent decision of *Barkas v North Yorkshire County Council and Scarborough Borough Council* [2012] established beyond doubt that use by the public for lawful sports and pastimes of land provided under section 164 of the Public Health Act 1875 is 'by right' not 'as of right'. The Court of Appeal decision establishes the following three principles: (a) that there is a distinction between a use of land 'by right' and a use of land 'as of right', (b) that if a statute properly construed confers a right on the public to use the land for recreational purposes, the public's use of that land will be 'by right' and not 'as of right', and (c) that section 10 of the Open Spaces Act 1906 (with which *Barkas* was specifically concerned) is an example of land which is provided by a local authority as open space which the public use for recreational purposes 'by right'.

Use by local residents under section 164 Public Health Act 1875 was another example of the application of 'by right' use and the inspector concluded that the use of the major part of the application land was not 'as of right' at any relevant point before the appropriation for planning purposes on 25 June 2010. In relation to the remainder subsequently acquired he considered that use of this part had also been 'as of right'. In *Barkas* the Court of Appeal held that the position when a recreation ground was provided under section 80 of the Housing Act 1936 was no different to the position when land was provided for recreational purposes under section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875. The inspector considered that there was no reason why the position should be any different when the acquisition was under section 789(1)(a) of the Housing Act 1936.

He therefore concluded overall that no part of the application land was used 'as of right' for any part of the relevant period of twenty years expiring on 25 June 2010. The fact that byelaws had been made but no communication of the byelaws had taken place would have affected a case based on implied, revocable permission but that was not the objector's case and it did not affect his conclusion on this issue.

8. INSPECTOR'S CONCLUSION AND RECOMMENDATION

The inspector's overall conclusion is that the requirements for the application to succeed are not made out.

This is because (a) the applicant did not provide a qualifying neighbourhood or locality or, in the alternative, (b) the applicant failed to prove use by a significant number of inhabitants of any qualifying neighbourhood or locality, and (c) use of the application land could not have been and was not 'as of right' at any relevant time before the appropriation of the application land for planning purposes on 25 June 2010.

He therefore recommends that the application should be rejected.

9. REPRESENTATIONS FOLLOWING INSPECTOR'S REPORT

The inspector's report was circulated to applicant and objector. No further representations were received.

10. LOCAL MEMBER NOTIFICATION

The two local county councillors Councillor Terri Sargent and Councillor John Dornan have been consulted.

Councillor Dornan responded supporting the inspector's finding. He is aware of the location of the application land having moved near to it over fifty years ago. He said that so far as he is concerned local members have saved the land from the proposed housing development and the previously derelict hall has been brought back into service with a new group running it under a lease.

11. RECOMMENDATION

It is **RECOMMENDED**

That the application is rejected as the application land has a legal status which defeats the acquisition of village green rights over it.

BACKGROUND PAPERS

Application by Mr N Adams dated 23 August 2010 with supporting papers.
Local Members Laindon Park and Fryerns

Ref: Jacqueline Millward CAVG/56

APPENDIX 1

APPLICATION TO REGISTER LAND KNOWN AS POUND LANE RECREATION GROUND, POUND LANE, LAINDON, BASILDON, ESSEX AS A TOWN OR VILLAGE GREEN: ESSEX COUNTY COUNCIL APPLICATION NO. 49

REPORT

By

Alan Evans

Kings Chambers

36 Young Street

Manchester

M3 3FT

CONTENTS

Recommendation: the Application should be rejected.

Introduction

1. I am instructed in this case by Essex County Council in its capacity as registration authority for town or village greens ("the Registration Authority") in order to assist it in determining an application ("the Application") to register land known as Pound Lane Recreation Ground, Laindon, Basildon, Essex ("the Application Land") as a town or village green.

2. The Application is dated 23rd August 2010 and was made by Mr Terence Brian Adams ("the Applicant") of 7 Elverston Close, Laindon, Basildon, Essex, SS15 5TY.

3. My instructions were to hold a public inquiry to hear the evidence and submissions both for and against the Application and, after holding the inquiry, to prepare a written report to the Registration Authority containing my recommendation for the determination of the Application.

4. I held the inquiry at the Wickford Centre, Alderney Gardens, Wickford, Essex on 21st and 22nd August 2012.

5. At the inquiry the Applicant represented himself with assistance from Mr Michael Marchant and the objector, Basildon Borough Council, was represented by Mr Alun Alesbury of counsel. I thank the Applicant, Mr Marchant and Mr Alesbury for their assistance at the inquiry. I also thank the Registration Authority for arranging the inquiry and its administrative support.

6. I made an unaccompanied visit to the Application Land on the morning of 21st August 2012 and familiarised myself thoroughly with it before the inquiry began. On the same occasion I familiarised myself with the surrounding area by driving round it. With the agreement of the parties I did not hold an accompanied site visit.

7. The Council was formerly Basildon District Council and before that again, pre-1974, Basildon Urban District Council. The Council is also a statutory successor to Billericay Urban District Council which is referred to later in this report. Where appropriate to do so, references in this report to "the Council" should be taken to include its statutory predecessor authorities.

The Application

8. The Application sought the registration of the Application Land under section 15(1) of the Commons Act 2006 ("the 2006 Act") on the basis that section 15(2) applied.

9. Section 15(2) of the 2006 Act applies where –
"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
(b) they continue to do so at the time of the application."

10. The relevant 20 year period for the Application in this case is 1990-2010.

11. The Application was supported by 14 completed evidence questionnaires.

12. The Application was objected to by the Council on 28th January 2011 in its capacity as owner of the Application Land. The main ground of the objection was on the basis that use of the Application Land had not been, and could not be, "as of right" because the Application Land had been acquired and laid out as a public park or pleasure ground by the Council's predecessor, Billericay Urban District Council, under section 164 of the Public Health Act 1875 ("the 1875 Act"). The Council's objection was later supplemented on 25th May 2011 by a "submission of factual position" in which the Council explained the history of the acquisition of the Application Land and the statutory basis for it.

13. The Applicant responded on 26th June 2011 and the Council provided comments on that response on 17th July 2011.

14. The matter has thereafter proceeded to the inquiry which is the subject of this report.

The Application Land

15. The boundaries of the Application Land shown on the plan which was submitted with the Application (as "Map (A)") do not match the boundaries shown on the aerial photograph of the Application Land and surrounding area which accompanied the statutory declaration of 23rd August 2010 sworn by the Applicant in support of the Application. The discrepancy relates to the north east part of the Application Land. The boundaries of the Application Land shown on Map (A) extend further to the east than the boundaries shown on the aerial photograph accompanying the statutory declaration and take in an area of land which is occupied by a tarmac-surfaced car park, a single storey community building (marked on Map (A) as "pavilion") and a children's play area bounded by railings and equipped with swings and a slide. It was confirmed by the Applicant at the inquiry that the boundaries shown on the aerial photograph accompanying the statutory declaration were to be taken as the correct boundaries of the Application Land. Accordingly I proceed on the basis that the car park, community building and children's play area do not form part of the Application Land.

16. The Application Land is an irregularly shaped area, mainly grassed, which has every appearance of a modest public park. Its general location is to the west of Pound Lane and to the north of Kathleen Ferrier Crescent. The boundaries of the Application Land are more particularly as follows. The eastern boundary of the Application Land in its northern section lies immediately to the west of the tarmac-surfaced car park and community building which I refer to in the preceding paragraph. The southern section of the eastern boundary of the Application Land runs along a line marked by the rear of backland plots off Pound Lane and the back gardens of properties on Elverston Close. The short southern boundary of the Application Land lies to the north of the rear gardens of properties on Tallis Road. The longer, gently curving south west boundary of the Application Land is formed by a line described by the northern extent of property curtilages on Kathleen Ferrier Crescent. The short western boundary of the Application Land lies along the line of

the eastern edge of the gardens of properties in Beecham Court. The northern boundary of the Application Land follows a roughly straight line which, in the east, is marked by the southern extent of property curtilages in Shrubbery Close and Nursery Gardens and, in the west, by the southern edge of a densely wooded area lying outside the Application Land and to the west of Nursery Gardens and south of Willowfield.

17. The Application Land is freely accessible from the car park which itself is accessed by a short section of road leading off Pound Lane. From the car park a tarmac-surfaced path runs across roughly the middle of the Application Land to the west where it joins an access from Kathleen Ferrier Crescent. Another tarmac-surfaced path branches off the east-west path and strikes off in a south westerly direction, again meeting an access from Kathleen Ferrier Crescent. This second access from Kathleen Ferrier Crescent lies to the east of the first access from Kathleen Ferrier Crescent and is opposite the point where that street meets Basildon Drive. In the north west corner of the Application Land an informal and unsurfaced but well-worn path leads into the Application Land from Willowfield. On the eastern section of the northern boundary of the Application Land there is a passageway which gives access on foot to the Application Land from Nursery Gardens.

18. I describe next the features of the Application Land. I have already mentioned the east-west footpath across roughly the middle of the Application Land. This footpath is lit and is also provided with benches and bins for both litter and dog waste. I have also already mentioned the second footpath which branches off from the east-west footpath in a south westerly direction. A further tarmac-surfaced loop of footpath leads off the second footpath in a roughly easterly direction to a small patch of tarmac towards the south east corner of the Application Land. The evidence established that this patch of tarmac was once the site of a children's roundabout and, after that, a basketball hoop. On the eastern side of the Application Land south of the east-west footpath and north of the loop I have just described is a small MUGA (or MUSA).[1] The MUGA is hard-surfaced and enclosed by a mesh fence but has unrestricted access points. It is equipped with goalposts and basketball

[1] Multi-use games area (or multi-use sports area).

hoops. In the eastern half of the Application Land to the north of the east-west footpath there is a pair of football goalposts. There are some low grassed mounds along the western part of the northern boundary of the Application Land. The boundaries of the Application Land are largely marked by mature trees and vegetation (although this is less the case on the south west boundary with Kathleen Ferrier Crescent). There are a number of trees along the line of the east-west footpath and there are small groups of trees just inside the western boundary of the Application Land and in its north east and south east corners.

19. I did not see any notices on the Application Land on the occasion of my site visit save that workmen were in the process of installing a byelaws notice at the beginning of the east-west footpath where it leads off from the car park. It also appeared to be the case that a metal bollard (of the type which would prevent vehicular access to the footpath) was being installed at this point.

20. The evidence establishes that the Application Land, apart from being called Pound Lane Recreation Ground, is also known, variously, as "The Paddocks" or "Pounders". The community building just to the east of the Application Land is called "The Paddocks Community Hall".

21. The history of the Council's acquisition of the Application Land is set out later in this report as part of the account of the evidence of one of the Council's witnesses, Mr Topsfield. I do not therefore deal with that at this point.

22. For the sake of narrative completeness there is, however, one other matter which I mention here. On 25th June 2010 the Council appropriated the Application Land for planning purposes under section 122(2A) of the Local Government Act 1972. This action was part of a wider strategy by the Council to raise funds for the development of a new "Sporting Village" within the borough. As the appropriation came at the very end of the relevant 20 year period, it does not bear on the situation which pertained for all but two months of that period and, in consequence, it did not feature in the inquiry save as a piece of background information. I refer to it here for no other purpose.

Neighbourhood and locality

23. In answer to question 6 on the application form (form 44) asking for there to be shown the locality or the neighbourhood within the locality to which the claimed green related, the Applicant referred to the area which he had marked on Map (A). The area so marked constituted a roughly rectangular area of limited extent surrounding the Application Land. Its boundaries were marked, to the east, by the eastern side of Pound Lane and, to the north, by the northern extent of the development on Nursery Gardens (on the eastern half of the northern boundary) and the northern extent of the Application Land (on the western half of the northern boundary). The western and southern boundaries appeared as arbitrary straight lines cutting through plots in the general housing area.

24. The directions which were issued by the Registration Authority on 12th June 2012 required the Applicant's bundle to contain both a large scale OS map on which the boundaries of any area relied upon by the Applicant as a "locality" for the purposes of the Application were clearly marked and a similar map on which the boundaries of any area relied upon by the Applicant as a "neighbourhood" for the purposes of the Application were clearly marked. In response to these directions the bundle prepared by the Applicant for the inquiry contained a "locality" plan which had the same boundaries as those which had been marked on Map (A) and which I have described in the preceding paragraph. I will call this "Plan (C)" to reflect the sub-paragraph of the directions which required its production. The Applicant's inquiry bundle also contained a "neighbourhood" plan in response to the directions. I will call this "Plan (D)" again to reflect the sub-paragraph of the directions which required its production. Plan (D) plan showed a considerably larger neighbourhood area than the locality area shown on Plan (C). The area so shown constituted a large, roughly rectangular, area extending well beyond the boundaries shown on Plan (C) and taking in, inter alia, an area to the south of St Nicholas Lane.

25. Eventually the Applicant and Mr Marchant put the case at the inquiry on the basis of revised plans which I will call Revised Plan (C) and Revised Plan (D). I deal with the detail of how this matter unfolded at the inquiry in paragraphs 34-36 below. Mr Marchant explained that these plans were the wrong way round in terms

of the directions in that Revised Plan (C), which the directions contemplated as the locality plan, was to be understood as the neighbourhood plan and Revised Plan (D), which the directions contemplated as the neighbourhood plan, was to be understood as the locality plan. Revised Plan (C) shows a claimed neighbourhood bounded by St Nicholas Lane in the south, High Road in the west and the A127 Southend Arterial Road in the north. The eastern boundary is drawn to follow a line which runs to the east of Pound Lane from the A127 in the north through the grounds of St Nicholas Church to meet St Nicholas Lane in the south. Revised Plan (D) shows a claimed locality which has the same boundaries as the claimed neighbourhood on Revised Plan (C) save that the eastern boundary extends further east and is drawn along Upper Mayne.

The evidence in support of the Application

26. In the succeeding paragraphs under this section I set out a brief summary of the evidence given by the witnesses called by the Applicant in support of the Application. I heard from 5 "live" witnesses.

27. **Valerie Jean Kingsley** of 35 Basildon Drive, Laindon said that she had lived in the area for 51 years and knew it extremely well. In the 1970s and 1980s she had used the Application Land with the Brownies/Guides which she ran. The Application Land then was very similar to how it was now although the tree growth was now greater. She now used the Application Land with her six grandchildren for a kick-about with a ball or picnics. She assumed the Application Land was owned by the Council but had never seen any signs restricting what could be done. She never felt that permission had to be asked in order to use the Application Land.

28. **Frances Livesey** of 98 Pound Lane said that she grew up in Laindon and had lived on King Edward Road but her friends were from the area around the Application Land which was how she had got to know of it. She had moved away later but had come to live in Pound Lane about 19-20 years ago. She used the Application Land with her grandchildren. She had never felt that she needed to get permission to use the Application Land and her use of it was open.

29. **Christine Finch** of 9 Shrubbery Close said that she had lived at that address for 19-20 years. She took her dog on to the Application Land five times a day every single day. Her great grandchildren played on the Application Land and, before that, her grandchildren had played there. There had never been any indication that byelaws applied to the Application Land and she had never seen any signage. She did not feel that she had to ask anyone to go on to the Application Land and that, although it was Council-owned, it was publicly available.

30. **Jeanette Overy** of 116 Pound Lane said that she had lived at that address for 20 years and, ever since moving there, she had used the Application Land as a park. She took her grandchildren there. They played rounders, cricket and football. Other youngsters did the same. She regularly walked the dogs there. There were so many dog walkers, there was quite a fraternity of them. She had never seen any evidence of byelaws.

31. **Michael Marchant** of 108 Pound Lane provided some historical information. He said that he was born in Laindon and had had relations, most of whom were farmers, in the Pound Lane area. His earliest recollection of use of the Application Land went back to the early 1950s when he was a child, from when he could remember a lot of grassland. The grass was rarely cut then and, when it was, it was with field cutting equipment. To the best of his recollection, the building of the Kathleen Ferrier estate began in the early 1960s. The Application Land then got used more and more and, as the estate was built up, the grass was cut more regularly. There had later on been Council nurseries in the vicinity where plant and equipment was kept. Nursery Gardens and Shrubbery Close were built in the late 1980s and early 1990s so that that part of the former field became housing. There had previously been two ponds on the Application Land which were filled in because they were dangerous. The mounds in the northern part of the Application Land had been formed by the deposit of excess spoil.

32. Mr Marchant produced two maps. One was an extract (showing the Laindon area) of a map accompanying the Basildon New Town (Designation) Order 1949; the other was a large scale Ordnance Survey Map of Laindon which Mr Marchant thought was from 1978. On the latter the legend “recreation ground” appears in the

location of the Application Land. Mr Marchant also submitted an indexed street plan leaflet of Basildon, Billericay and Wickford, produced by Essex County Council in 2010 which, he pointed out, did not identify the Application Land as a leisure facility either on the relevant street plan or in the relevant index. Mr Marchant further explained, by reference to e-mails and a press clipping, how the MUGA at the Application Land had come about. It was originally destined for another site at South Green in Billericay but was not wanted there by local residents. It then came to be installed on the Application Land in 2006 by way of a follow-up to a request to the Council for better children's play facilities on the Application Land made in 2005 by a schoolgirl from Tallis Road. The patch of tarmac in the south east of the Application Land had previously hosted a basketball hoop and, before that, a children's roundabout which had been taken out for safety reasons.

33. Mr Marchant said that he had never seen any notices to explain the use of the Application Land or that there were byelaws applying to it. 95% of the parks he went to had such notices. He expressed the view that the 1875 Act had often been used by councils to buy land as the easiest way later to convert to building land. He further made reference to a document produced by the Council entitled "Basildon District Council PPG17 Open Space Assessment 2010" and pointed out that the Application Land was classified therein in the Council's typology as "amenity green space", which was exampled by "village greens and ponds" rather than a recreation ground.

34. When I asked Mr Marchant about Plans (C) and (D) he explained, initially, that the Application was to be considered on the basis of the qualifying area being taken to be that marked on Plan (D) which he suggested was a locality and represented the ward of Laindon Park. When cross-examined on these matters, Mr Marchant accepted, in relation to Plan (C), that, apart from the northern boundary marked on that plan, the other boundaries had just been drawn down grid lines on the plan. He said that the plan was probably a bit of a misunderstanding. In relation to Plan (D), he was not able to counter the suggestion put to him that some of the boundaries on this plan were simply arbitrarily drawn along grid lines on the plan, cutting through properties in places, nor was he able to offer any explanation to deal with the issue

of why what appeared to be a significant but arbitrary chunk of territory south of St Nicholas Lane had been included. He accepted that the boundaries shown on Plan (D) did not, in fact, represent the ward of Laindon Park.

35. In the light of the above I allowed, without objection from the Council, the Applicant and Mr Marchant the opportunity to reconsider how they wished to present the Application in terms of the relevant qualifying area which they relied on to support the Application and to produce revisions of Plans (C) and (D) as they saw fit. In the meantime, I also allowed Mr James Groves, the Council's Legal Manager for Property, Regeneration and Contracts, to confirm to the inquiry that which Mr Marchant had accepted, namely, that the boundaries of the Laindon Park ward were not those shown on Plan (D). Mr Groves explained that Laindon Park ward was a very much larger area, which had come into being in 2001, and that the area shown on Plan (D) had formerly been part of Lee Chapel ward.

36. The final upshot of these matters was that the Applicant and Mr Marchant produced two amended plans on the morning of the second inquiry day, 22nd August 2012, which I have already referred to in paragraph 25 above as Revised Plan (C) and Revised Plan (D). I have also already described what is shown by Revised Plan (C) and Revised Plan (D) in paragraph 25 above and it is not necessary to repeat that description here. These were the plans finally relied upon in support of the Application.

37. There are two final matters which I mention for the purposes of my summary of the evidence in support of the Application. The first is to record that the Applicant himself chose not to give any oral evidence at the inquiry. The second is to confirm that I have taken into account in writing my report all the material contained in the Applicant's inquiry bundle, including: 16 completed evidence questionnaires (being made up of the 14 completed evidence questionnaires submitted with the Application plus a further two); five witness statements; various photographs; and extracts from "Basildon District Council PPG17 Open Space Assessment 2010".

The evidence called by the Council

38. Mr Alesbury called two witnesses on behalf of the Council, Andrew Roger Topsfield and Hugh David Reynolds.

39. **Andrew Roger Topsfield** said that he was employed as a Principal Estate Surveyor at Basildon Borough Council. In the course of his duties Mr Topsfield had been involved in the acquisition, management and disposal of property, including valuation, negotiation, verification of boundaries and assistance in the conveyancing process. The operational management of open space was a function of the Council's Parks Section. The Application Land constituted the Pound Lane Recreation Ground which had been acquired by the Urban District Council of Billericay on various dates between 1938 and 1952. The main part was acquired through several transactions in 1938.

40. No file papers relating to the acquisitions could be traced. These would have comprised the surrounding correspondence. Nothing, however, was missing from the deed packet. The purpose of the acquisitions was for open space and recreation and the intention was that the acquired land be used by the public as an amenity. Mr Topsfield referred to, and produced, a minute, number 338, of the Billericay Urban District Council's Recreation Grounds and Open Spaces Committee's meeting held on 14th February 1938. This was all that could be found. The minute refers to three sites, one of which is described as "Land, Pound Lane, Laindon". It then records that the advice of the Clerk in respect of "the proposed acquisition by the Council of the above lands" was that the sites "might be acquired as 'playing fields,' as distinct from 'open spaces,' under section 69 of the Public Health Act, 1925, in which case the County Council might be asked for a contribution towards expenses incurred in acquisition, lay-out, equipage and maintenance." The recommendation of the Committee was that the three sites "be acquired by the Council under section 69 of the Public Health Act, 1925, and that application be made to the County Council for grant under that Section." A further recommendation was also made, which was that "the Section under which land is to be acquired be determined on the merits of each particular case."

41. Mr Topsfield then referred to, and produced extracts from, the Council's Terrier. There are six relevant extracts (all headed up "Urban District Council of Basildon Terrier of Property") which record a number of acquisitions in respect of land at Pound Lane, Laindon which, taken together, include all of the area which now comprises the Application Land. The conveyances also included other areas around the Application Land which now have housing built on them. In chronological order the acquisitions recorded are:
    (i) an acquisition at a price of £150 from J.H. Rawley on 1st December 1938;
    (ii) an acquisition at a price of £30 from H.J. Poulter and another, also on 1st December 1938;
    (iii) an acquisition at a price of £115 from May L. Ralph on 13th December 1938;[2]
    (iv) an acquisition at a price of £235 from Harry Ralph on 30th December 1938;
    (v) an acquisition at a price of £100 from M.J. Barrett on 23rd January 1939;
    (vi) an acquisition at a price of £150 from Mrs E. McClellan on 11th January 1952.

42. In respect of the first five acquisitions ((i) – (v)) noted in the previous paragraph the Terrier extract in each case bears the same site and deed number (No. 47) and records that the purpose of the acquisition was "Pound Lane Public Open Space" and that the statute in question was "Public Health Act 1875 – 1925". The last acquisition ((vi) above) bears a different site and deed number (No. 199) and records that the purpose of the acquisition was "housing" and the statute in question was "Housing Act 1936". This extract also has a heading of "Pound Lane Housing Site".

43. Mr Topsfield produced an official copy of the Land Registry's register of title, showing that the Council is the owner of the whole of the Application Land and then copies of the conveyances relating to each of the parcels of land in the Terrier itemised in paragraph 41 above. The conveyances in respect of the first five acquisitions itemised in paragraph 41 above ((i) – (v)) are each to the Urban District Council of Billericay, each recites that the Urban District Council wished to make the acquisition "for purposes mentioned in the Public Health Acts 1875 to 1925" and each is accompanied by a plan which is headed "Proposed Open Space

Laindon". The conveyance in respect of the last acquisition itemised in paragraph 41 above ((vi)) was also to the Urban District Council of Billericay. The conveyance does not refer to any statutory acquisition power. The back sheet of the conveyance states that the land conveyed was "to form part of Pound Lane, Laindon Permanent Housing Site". Mr Topsfield also produced a plan relating the Application Land to the various conveyances and showing which parts of the Application Land were acquired under which conveyances. For present purposes I need note only that the five conveyances in 1938-39 ((i)-(v) above) cover the vast majority of the Application Land and that the last conveyance of 11th January 1952 ((vi) above) covers a small part of the Application Land in its south east corner.

44. Mr Topsfield said that the Application land had, since approximately the 1960s, been laid out as open space and for recreation. It was so marked on Ordnance Survey maps. In this connection Mr Topsfield produced two plans which he said dated from the late 1960s and early 1970s. Each plan has the legend "recreation ground" on it in the location of the Application Land.[3] Mr Topsfield said that it was not clear when the recreation ground use commenced but it was believed to be shortly after the development of the adjoining Council housing estate which was in the late 1950s and early 1960s.

45. Mr Topsfield confirmed that the Application Land had recently been appropriated for planning purposes and produced the relevant decision record which shows that this took place on 25th June 2010.

46. Mr Topsfield told Mr Marchant in cross examination that he was pretty sure that there had not been any need for any later acquisitions of land forming back gardens to properties on Pound Lane in order to put in the car park and the community centre. The New Town had been designated in 1949 and acquisition for its purposes

[2] The reference in the Terrier to 13th December 1938 appears to be an error. The relevant conveyance is dated 30th December 1938.

[3] One of the plans is that which would have accompanied the sale of 59 Kathleen Ferrier Crescent. This plot of land had been included in the 11th January 1952 conveyance to the Urban District Council of Billericay. Its later conveyance from the Urban District Council of Basildon to the purchasers of the plot is endorsed on the 11th January 1952 conveyance as part of a "memorandum of sales". The date of the conveyance by the Urban District Council of Basildon was 14th April 1980 so the plan must, it would seem to follow, have a base date at some point before then. Mr Topsfield said that he thought the plan would have a 1950s-1960s base.

then started but local authority schemes which were already under way were left to continue separately. He was not able to comment on the suggestion put to him that the land on which Nursery Gardens and Shrubbery Close now stood had once been part of a wider open space area but stated that this area was outside the Application Land. Mr Topsfield told me that there was no record of any formal appropriation of land within the parcel acquired on 11th January 1952 (acquisition (vi)) from housing purposes to public open space; had there been such appropriation, it would have been noted on the Terrrier.

47. **Hugh David Reynolds** said that he was employed by the Council as the Manager of Parks and Grounds Maintenance. His involvement with the Application Land had been with its operational management and maintenance as a park. It had been managed by the Council as an area where informal activities took place. The amenities included an equipped play area, a multi-use sports area, a kick-about football pitch, benches and car parking. There was also the Paddocks Community Centre which was managed by the trustees of the community association. On occasions more organised activities took place, as an example of which Mr Reynolds referred to the lighting of a beacon for the Queen's Diamond Jubilee.

48. The maintenance of the Application Land had reflected the activities which took place there. The maintenance included general amenity grass cutting, pruning of hedges and shrubs on an annual basis, tree pruning when required, litter picking and general inspections.

49. The Application Land was covered by byelaws and Mr Reynolds produced a copy of the Council's "Byelaws" for "Pleasure Grounds and Open Spaces" 1997 ("the 1997 Byelaws"). The 1997 Byelaws are stated to be made under section 164 of the 1875 Act, section 15 of the Open Spaces Act 1906 ("the 1906 Act") and sections 12 and 15 of the 1906 Act "with respect to pleasure grounds and open spaces". The Application Land is identified in the Schedule to the 1997 Byelaws as "Pound Lane Recreation Ground, Laindon". I note by way of interpolation here that a previous set of byelaws ("Basildon District Council Bye-laws Pleasure Grounds 1979" ("the

1979 Byelaws")) did not include the Application Land as one of the relevant pleasure grounds.[4]

50. When cross examined by Mr Marchant, Mr Reynolds was not able to say why byelaws had not been displayed at the Application Land other than to suggest it was because of the small size of the park and its much more local function. He accepted the point that the grass cutting on the Application Land had fallen behind this year. Mr Reynolds confirmed to me that he thought that there had formerly been a roundabout on the Application Land which would have been replaced by a basketball hoop. The football pitch on the Application Land was for informal use only and was just provided with a pair of goalposts. Grass cutting was planned to be on a 15 day cycle in the summer.

The Submissions

(a) The Council

51. On behalf of the Council, Mr Alesbury first dealt with the issue of neighbourhood and locality. He submitted that both Plan (C) and Plan (D) were hopelessly inappropriate to meet the statutory criteria. Although the Laindon Park ward had been raised in the course of the inquiry, it was not in fact eventually relied upon. In any event, it was not really suitable under either statutory heading. It was much too large to be a sensible neighbourhood in relation to any of the evidence given and it was not really suitable as a locality, having only existed in its present form since 2001. As to Revised Plan (C), Mr Alesbury submitted that the area shown thereon could be a neighbourhood and it avoided the obvious defects of the original Plan (C). However, no exercise had been done to match the area to the evidence of use. Revised Plan (D) was appropriate neither as a locality or a neighbourhood.

52. Mr Alesbury did not dispute that the Application Land had been used for 20 years (from 1990-2010) for lawful sports and pastimes. The Application Land was, after all, a public park or recreation ground.

[4] These byelaws did refer to "Pound Lane Park" but this was a reference to a different piece of land, namely,

53. Mr Alesbury submitted that the key issue was whether use of the Application Land had been "as of right" or "by right". He commended to me an opinion from 2008 by Mr Vivian Chapman QC in relation to an application to register a new green at the Oak Colliery Site in Oldham as an extremely useful summary of the law as it then stood. The Council's essential point was that the Application Land could not have been used "as of right" in a trespassory way because, for effectively the whole of the relevant period, it was made available "by right" as a public park or recreation ground.

54. The case of *Malpass v Durham County Council*[5] showed that, in a case which potentially concerned a public park or public open space, it was important for a conclusion to be reached, on the balance of probabilities in the light of the evidence, as to the statutory purpose for which the owning authority (or its predecessor) came to own or hold the land concerned. It was not acceptable just to say, for example, that it was not quite clear what the land was acquired for but that it came to be thought of as a park or public open space.

55. In respect of the evidence in the present case, Mr Alesbury submitted that, while the 1938 recommendation of the Recreation Grounds and Open Spaces Committee of Billericay Urban District Council referred to section 69 of the Public Health Act 1925 ("the 1925 Act"), it was not a purchase resolution and, even as a recommendation that that section be used, it was accompanied by a further recommendation that "the Section under which land is to be acquired be determined on the merits of each particular case." As for the actual documents relating to the purchases in 1938-1939 ((i)-(v) in paragraph 41 above), the conveyances stated that the land was acquired for purposes mentioned in the Public Health Acts 1875 to 1925 generally and the conveyance plans were very clearly labelled "Proposed Open Space Laindon". Also, in each of these cases the old Basildon Urban District Council Terrier recorded the "purpose" of the acquisition as "Pound Lane Public Open Space" and the statutory reference was the same as in the conveyances.

Pound Lane Park, Bowers Gifford as referred to in the Schedule to the 1997 Byelaws.

[5] [2012] EWHC 1934 (Admin).

56. Mr Alesbury said that, were it not for the statutory references, he would be arguing that the probability was that these were 1906 Act public open space acquisitions. As it was, his submission was that the proper inference was that the acquisitions must have been seen as straightforward acquisitions under section 164 of the 1875 Act. This was the normal power by which parks and open areas intended to be made available to the public would be acquired. "Public Open Space" in the Terrier and in the conveyance plans was a reasonable term to describe this sort of land as the statutory consequences of such an acquisition were virtually the same as for "public open space" acquisitions under the 1906 Act. There was nothing at all about the actual conveyances and Terrier entries which suggested that any of the land acquired in 1938-39 was in the event acquired for the rather more specific "laying out for cricket or football" sort of use contemplated by section 69 of the 1925 Act. Nor, incidentally, did any evidence as to what actually happened on the ground suggest that the old Billericay Urban District Council ever thought that it had acquired the land for the specific purpose of section 69 of the 1925 Act. Section 164 of the 1875 Act was the obviously appropriate power to be inferred and was wholly consistent with the conveyances and the Terrier and, indeed, the 1938 recommendation which had referred to the acquisition section being "determined on the merits of each particular case."

57. If that were the case, the public's use of the land had undoubtedly been "by right" ever since.

58. Mr Alesbury then dealt with the 1952 acquisition ((vi) in paragraph 41 above) which was under the Housing Act 1936 ("the 1936 Act"). So much of this plot of land as fell within the Application Land had been laid out as part of the park/open space. In this respect the case was an exact factual parallel with what had happened in the case of *Barkas v North Yorkshire County Council.*[6] For exactly the same reasons found by the inspector in that case, and upheld by the court, Mr Alesbury submitted that it should be concluded that this part of the Application Land had also been used by local people "by right" and not "as of right". The housing power in section 80 of the 1936 Act included a power to provide and maintain a recreation

ground. The utilisation of that power would therefore make it unnecessary for there to be any later appropriation of the land from housing to recreational purposes.

59. In respect of the byelaws, Mr Alesbury submitted that their relevance was that they were corroborative of the point that the Application Land was seen as being held under section 164 of the 1875 Act. The Council did not argue that, because it put byelaw notices up, it gave people permission to use the Application Land (the evidence as to whether there might ever have been any notices being inconclusive). The point was that the status of the Application Land in fact gave people the right to be there. In this connection Mr Alesbury relied on the judgment of Ouseley J in *Newhaven Port and Properties Limited v East Sussex County Council.*[7] This case was not like (for example) a piece of land within a port where it might have been necessary to erect byelaw (or other) notices telling people they had permission to use the piece of land when otherwise they might not have expected to have such a right. Incidentally, it seemed fairly obvious from the oral evidence called in support of the Application that, in this case, in spite of the apparent lack of notices, people did know the Application Land as the "park", knew that it had been provided by the Council and understood that they had a right to be on there, using it.

60. Mr Alesbury's final detailed submission was that the fact that some activities indulged in on the Application Land might have been in breach of the applicable byelaws was irrelevant. Even if that had been the case, it could never generate a claim under the 2006 Act based on "lawful" sports and pastimes. In this respect Mr Alesbury referred again to the judgment of Ouseley J in *Newhaven Port and Properties,* this time at paragraphs 93 and 103.

(b) The Applicant

61. The material points made by Mr Marchant by way of closing submissions on behalf of the Applicant were as follows. Mr Marchant submitted that all the necessary requirements for village green status had been made out and that the Application

[6] [2011] EWHC 3653 (Admin). I provide the reference to the first instance decision here. After the close of the inquiry the decision was upheld in the Court of Appeal. See paragraphs 98, 104-106 and 108 below.
[7] [2012] EWHC 647 (Admin) at paragraph 85.

should therefore be accepted. Contrary to the Council's case, which could not be substantiated, use of the Application Land had been "as of right" and not "by right". Land held by local authorities for open space or recreational purposes was not exempt from registration under the 2006 Act. No evidence had been produced by the Council which showed either that local residents had been informed of the status of the Application Land nor had byelaws ever been displayed on any notice boards or made the subject of any other written or oral communication from the Council. Essex County Council's 2010 street plan leaflet did not even identify Pound Lane Recreation Ground as a leisure facility. Moreover, in "Basildon District Council PPG17 Open Space Assessment 2010" the Application Land was classified in the Council's typology as "amenity green space", of which the example was "village greens and ponds".

Findings and analysis

(a) Introduction

62. The key issues in this case relate to the question of neighbourhood and locality and whether use of the Application Land has been "as of right". It is necessary therefore to devote most of the analysis in this section to these particular issues. Before doing so I consider, first, whether the Application Land has been used for lawful sports and pastimes for at least 20 years.

(b) Use of the Application Land for lawful sports and pastimes for at least 20 years

63. I find that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period. The oral and written evidence presented in support of the Application is sufficient to establish as much and the Council has never sought to suggest otherwise or to dispute that the Application Land has been so used. I am able to place weight on the written evidence in support of the Application in this case albeit that it has not been tested by cross examination. This follows both from the fact that the Council does not challenge evidence of use of the Application Land over the relevant period for lawful sports and pastimes and from the fact that such

use is entirely consistent with the provision of the Application Land as a recreation ground where such use is only to be expected.

64. My finding that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period is a finding that the whole of the Application Land has been so used. In making that finding I have borne in mind the observation of Sullivan J in *Cheltenham Builders Limited v South Gloucestershire District Council*.[8] What was said in that case was that *"the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years."* There are no reasons in this case, relating to the features of the Application Land or otherwise, to think that there are any areas of it which would not have been used. Again, it has been no part of the Council's case to make any contrary submission.

(c) Use by a significant number of the inhabitants of any locality or any neighbourhood within a locality

65. I next turn to the question whether the use of the Application Land for lawful sports and pastimes for the relevant 20 year period has been by a significant number of the inhabitants of any locality or of any neighbourhood within a locality. In considering this question I will adopt the conventional, shorthand terminology and refer to a limb (i) case and a limb (ii) case. A limb (i) case is one which is put on the basis of use by a significant number of the inhabitants of any locality. A limb (ii) case is one which is put on the basis of use by a significant number of the inhabitants of any neighbourhood within a locality. As I have already explained, the Application was eventually put forward at the inquiry by the Applicant and Mr Marchant on the basis that the neighbourhood relied upon was that identified on Revised Plan (C) with the locality within which that neighbourhood lay being that identified on Revised Plan (D). The Application was therefore finally put as a limb (ii) case.

[8] [2003] EWHC 2803 (Admin) at paragraph 29.

66. Accordingly, it is necessary first to consider what constitutes a neighbourhood for the purposes of a claim for registration of a new green under the 2006 Act. Neighbourhood is undefined in the 2006 Act as was also the case under section 22 of the Commons Registration Act 1965 as amended by section 98 of the Countryside and Rights of Way Act 2000. However, there are various judicial observations which need to be considered.

67. In *Cheltenham Builders* Sullivan J said that *"[i]t is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under 'locality', I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of <u>any</u> area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."*[9]

68. Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[10] pointed out that the expression *"any neighbourhood within a locality"* was *"obviously drafted with a deliberate degree of imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."*[11]

69. In *Oxfordshire and Buckinghamshire Mental Health Trust v Oxfordshire County Council*[12] HHJ Waksman QC said that *"[t]he area from which users must come now includes a neighbourhood as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a*

[9] At paragraph 85.
[10] [2006] UKHL 25.
[11] At paragraph 27.

locality."[13] In the same case HHJ Waksman QC also made the following observations: "*[w]hile Lord Hoffman said that the expression* [sc., neighbourhood within a locality] *was drafted with deliberate imprecision, that was to be contrasted with the locality whose boundaries had to be legally significant – see paragraph 27 of his judgment in Oxfordshire (supra). He was not saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality … but, as Sullivan J stated in R (Cheltenham Builders Ltd) v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way."*[14]

70. In *Leeds Group plc v Leeds City Council*[15] HHJ Behrens said that *"I shall not myself attempt a definition of the word 'neighbourhood'. It is, as the inspector said an ordinary English word and I have set out part of the Oxford English Dictionary definition.* [Sc., "A district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity"]. *I take into account the guidance given by Lord Hoffman in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TVGs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."*[16]

71. In relation to the question of the need for a neighbourhood to have boundaries, I have already quoted in paragraph 69 above the observation of HHJ Waksman QC in *Oxfordshire and Buckinghamshire Mental Health Trust* that Lord Hoffman in *Oxfordshire County Council* was *"not saying that a neighbourhood need have no boundaries at all."* In *Leeds Group plc* HHJ Behrens said, in relation to the issue of boundaries, *"I agree with Miss Ellis QC that boundaries of districts are often not*

[12] [2010] EWHC 530 (Admin).
[13] At paragraph 69.
[14] At paragraph 79.
[15] [2010] EWHC 810 (Ch).
[16] At paragraph 103.

logical and that it is not necessary to look too hard for reasons for the boundaries."[17]

72. When the latter case reached the Court of Appeal the issue in relation to neighbourhood that was considered was whether HHJ Behrens was right to uphold the inspector's view that neighbourhood did not have to be limited to a single neighbourhood and could include two or more neighbourhoods. The Court of Appeal upheld the judge on this point (by a majority)[18] but, for present purposes (as no issue in respect of two neighbourhoods arises here), I need note only that, in the course of so doing, Sullivan and Arden LJJ endorsed[19] Lord Hoffman's dicta, which I quote in paragraph 68 above, in *Oxfordshire County Council* in relation to the "*deliberate degree of imprecision"* in the drafting of the expression *"any neighbourhood within a locality"*. All the judges in the Court of Appeal also recognised that Parliament's intention in enacting the neighbourhood amendment (which was originally introduced by section 98 of the Countryside and Rights of Way Act 2000 and is now incorporated in section 15 of the 2006 Act) was to make easier the task of those seeking to register new greens and to avoid technicality by loosening the links with historic forms of greens.[20] In *Adamson v Paddico (267) Limited*[21] Sullivan LJ stated again that in the *Oxfordshire case "Lord Hoffman clearly considered that the new 'neighbourhood' limb had materially relaxed the previous restrictions relating to 'locality'".*[22]

73. In applying the law as described above to this case I make every allowance for the fact that the introduction of the neighbourhood criterion is intended to ease the task of applicants who seek to rely on limb (ii) to register a new green and I approach matters with that important consideration firmly in mind. I also remind myself that Mr Alesbury accepted that the area shown on Revised Plan (C) "could" amount to a neighbourhood. Notwithstanding these matters, I am nevertheless unable to find that the area shown on Revised Plan (C) constitutes a neighbourhood for the purposes of the 2006 Act. In reality, the area shown on Revised Plan (C) is no more

[17] At paragraph 105.
[18] Sullivan and Arden LJJ, Tomlinson LJ dissenting.
[19] See paragraphs 26 and 52.
[20] See, for example, paragraphs 24, 25, 26, 44 and 52.
[21] [2012] EWCA Civ 262.

than an area which the Applicant and Mr Marchant have chosen to delineate upon that plan. Even taking an undemanding approach to the issue of cohesiveness, there is simply no evidence before the inquiry which demonstrates that the area shown on Revised Plan (C) has any degree of cohesiveness. The circumstances in which Revised Plan (C) came to be put forward, which I have set out in paragraphs 34-36 above, tend to my mind to highlight that the area marked on it is simply an artificial construct created for the purposes of overcoming deficiencies in the original plans without addressing or understanding what a neighbourhood should entail. The boundaries shown on Revised Plan (C) may be considered to avoid arbitrariness in the sense of not cutting through properties but that does not avoid the problem that the area enclosed by the boundaries has not been shown to have any reasoned claim to be considered a neighbourhood; nor has any meaningful description of the area been proffered.

74. Even if I were wrong on the question of whether the area shown on Revised Plan (C) constitutes a neighbourhood, I do not consider that it has been demonstrated that there has been use of the Application Land by a significant number of inhabitants of the area shown on Revised Plan (C). I reach this conclusion because I do not think there has been shown a proper or adequate spread (or distribution) of users over the area shown on Revised Plan (C). The factual basis for this conclusion is that the addresses of those who provide evidence of their use of the Application Land are restricted to seven or so streets close to the Application Land, making up only a limited part of the area shown on Revised Plan (C), with no evidence of any users drawn from large parts of that area. While it might be said that there would have been use of the Application Land (as a public recreation ground) by residents drawn more widely from the area shown on Revised Plan (C) than the pattern of addresses revealed by the evidence in support of the Application, it is nevertheless not possible to make any reliable assumptions or reach proper conclusions about use of the Application Land by other users from elsewhere in the absence of evidence to demonstrate the same.

[22] At paragraph 27.

75. As to the legal question of whether there is any requirement for a proper or adequate spread of users over the qualifying area in question, I consider that there is as an aspect of the requirement that use must be by a significant number of inhabitants. Sullivan J dealt with the issue of "significant number" in *McAlpine Homes Ltd v Staffordshire County Council*[23] where, in a well-known passage, he said that *"the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"*.[24] If the local community is taken to be that making up the locality or neighbourhood in question then *general* use by the local community is not established if that use comes from only part of that locality or neighbourhood. On the facts of *McAlpine Homes* it is notable that the inspector had found that users had come from all parts of the relevant locality.[25]

76. I also consider that the requirement for a proper or adequate spread of users over the qualifying area in question is more generally justified as a matter of principle. It is, in my view, necessary that users come from all over the relevant locality/neighbourhood because, if it were sufficient that users came from just one part of the locality/neighbourhood, the locality/neighbourhood requirement would be rendered meaningless. In substance, one might just as well draw an arbitrary red line on a plan around the area from which users came. This is just what Sullivan J in *Cheltenham Builders* held a locality or neighbourhood not to be.[26] Moreover, such an approach would create a mismatch between the persons whose use led to the acquisition of rights and the persons who enjoyed the benefit of them, which would be contrary to general prescriptive principles and would impose a much greater burden on the land than the landowner had acquiesced in. It would thus infringe the principle of equivalence referred to by Lord Hope in *Lewis v Redcar and Cleveland Borough Council*[27] where he said that *"the theme that runs through all of the law on private and public rights of way and other similar rights is that of an*

[23] [2002] EWHC 76 (Admin).
[24] At paragraph 71.
[25] See paragraph 38 of the judgment. The locality in question was the town of Leek.
[26] See paragraph 67 above quoting Sullivan J's rejection (at paragraph 85 of the judgment) of the proposition that a neighbourhood could be any area that an applicant for registration chose to delineate upon a plan. See also paragraph 43 of the judgment where the judge made the same point in relation to a locality.
[27] [2010] UKSC 11.

equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other."[28]

77. Some assistance may also be derived from a passage in the judgment of HHJ Behrens in *Leeds Group plc* at first instance in which he stated that *"if … Yeadon cannot be a locality for the purpose of limb (ii), I would hold that the parish of St Andrew is the relevant locality. I see no reason to limit the meaning of 'locality' in limb (ii) in the manner suggested in paragraph 37 of Mr Laurence QC's skeleton argument* [which had contended that in limb (ii) a locality had to be of a size and situation such that, given the particular activities which had in fact taken place, it might reasonably have been capable of accommodating a proper spread of qualifying users undertaking activities of that type]. *There is nothing in the wording of the 2000 Act which refers to the size of the 'locality'. Furthermore one of the main purposes of the amendment, as it seems to me, was to allow inhabitants in a neighbourhood to qualify in a situation where the locality itself was too big. It cannot, in my view, have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users."*[29] In rejecting the submission that, in a limb (ii) case, the locality within which the relevant neighbourhood lay had to be small enough to accommodate a proper spread of qualifying users, HHJ Behrens appears to have accepted that there was such a requirement in respect of the neighbourhood itself.

78. Before leaving this topic it is finally necessary to make reference to certain remarks of Vos J in *Paddico* at first instance.[30] In paragraph 106 i) of the judgment Vos J said that he *"was not impressed with Mr Laurence's suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives to me such an illogical and unfair conclusion."* These observations were made in the context of consideration of the un-amended definition of a town or village green in section 22(1) of the Commons

[28] At paragraph 71.
[29] At paragraph 90. This passage was not the subject of later treatment by the Court of Appeal.
[30] Again, these remarks were not the subject of later treatment by the Court of Appeal.

Registration Act 1965. Vos J returned to the matter in paragraph 111 where, in the context of considering the amended definition in section 22(1A), he said again that he did *"not accept Mr Laurence's spread or distribution point."* It is not wholly clear whether Vos J was rejecting the principle that some kind of spread was required or whether he was simply rejecting the submission made to him on the facts that the particular spread was inadequate but I consider that the more natural reading of what he was saying suggests the latter rather than the former.

79. The next question is how the requirement for a proper or adequate spread of users is to be interpreted. It is submitted that it is here that the remarks of Vos J are particularly helpful. They point to the fact that the requirement should be interpreted in the light of the pattern of residence of the users one would expect to see. That might well be that one would expect to see most users of the claimed green coming from those houses closest to it and that one would not expect to see an equal spread or distribution of users from all over the qualifying area. However, I consider that the requirement for a proper or adequate spread of users must involve the proposition that if, on the evidence, users are confined to a limited part of the qualifying area and there is simply an absence of evidence of use by inhabitants of large parts of the qualifying area, the requirement is not made out. That case is this case.

80. In the light of those conclusions it is unnecessary for me to express a concluded view as to whether the area marked on Revised Plan (D) could constitute a locality for the purposes of the limb (ii) case which is made although I doubt that it could because no evidence or submission has been advanced as to the basis on which it might be so considered and no such basis is otherwise evident.

81. I have now dealt with the Applicant's case on neighbourhood/locality and significant number on the basis on which it was eventually put forward. The Application must fail on this basis because it has not been demonstrated that the area relied upon is a neighbourhood for the purposes of the 2006 Act, and, even if that were wrong and the area relied upon were a neighbourhood, it has not been demonstrated that use of the Application Land has been by a significant number of the inhabitants of that neighbourhood.

82. A registration authority, and an inspector reporting to such an authority, does not have a duty to reformulate an applicant's case; it is entitled to deal with the application and evidence as presented.[31] Be that as it may, I am in any event satisfied that the Applicant's case could not be sustained on any other permutation of neighbourhood/locality which might be considered to have arisen on the evidence at the inquiry. Thus, the Application could not succeed on the basis of treating the area shown on Revised Plan (D) as a neighbourhood within some wider, unspecified locality. The reasons for concluding that the area shown on Revised Plan (C) is not a neighbourhood, and that use would not have been by a significant number of its inhabitants even if it were, would apply equally, if not more strongly, in respect of the larger area shown on Revised Plan (D). The Application could not be sustained as a limb (i) case either on the basis of the area shown on Revised Plan (C) being treated as a locality or on the basis of the area shown on Revised Plan (D) being treated as a locality. Neither of these areas is an area known to the law or with legally significant boundaries.[32] The original Plan (C) and Plan (D), which were not in the event pursued at the inquiry, would not have enabled the case for registration to be made. The areas marked on these plans were simply arbitrary areas which the Applicant had chosen to delineate upon plans and neither area could justifiably be considered a neighbourhood for the purposes of the 2006 Act. It is also the case that neither area would have been a locality for the purposes of a claim on the basis of limb (i); neither is an area known to the law or with legally significant boundaries. Finally, the Laindon Park ward was mentioned at the inquiry but it too was not pursued. This ward might have been regarded as a locality but it only came into being in 2001.[33] Moreover, there could in any event be no conceivable evidential basis for any conclusion that use had been by a significant number of the inhabitants of such ward.

(d) *"***As of right"**

[31] See Lord Hoffman in *Oxfordshire County Council* at paragraph 61.
[32] A requirement well established in case law and re-affirmed by the Court of Appeal both in *Leeds Group plc* and *Paddico* in respect of the amended definition of town or village green introduced into the Commons Registration Act 1965 (as section 22(1A)) by section 98 of the Countryside and Rights of Way Act 2000.
[33] On which point see *Paddico* at paragraphs 30 and 62 (in the Court of Appeal judgment).

83. The conclusions I have already reached are fatal to the case for registration but I turn next to the further issue of whether use of the Application Land has been "as of right" given the focus of the Council's case on this issue.

(i) Power under which Application Land was acquired and held

84. The issue of whether use has been "as of right" is inextricably bound up with the question of the power under which the Application Land was acquired and held. As a local authority is a creature of statute it can only acquire land under some statutory power. In order to identify the statutory power involved it is necessary to consider the available historical evidence. I will deal with the 1938-39 acquisitions first, which cover the vast majority of the Application Land, before turning to the 1952 acquisition which covers only a small part of the Application Land in its south east corner.

85. In respect of the 1938-39 acquisitions, the starting point is the February 1938 minute and recommendations of the Recreation Grounds and Open Spaces Committee of Billericay Urban District Council. There is no reason to doubt that the subject matter of this document concerned the Application Land. The initial recommendation was that the acquisition take place under section 69 of the 1925 Act. Section 69(1) of the 1925 Act provided that a local authority *"may acquire by purchase, gift or lease, and may lay out, equip and maintain lands, not being lands forming any part of a common, for the purpose of cricket, football or other games and recreations"*. Section 69(2) provided that a county council might contribute towards the expenses incurred under this section by any other council. This latter power would have been the source of that part of the recommendation which referred to application being made to the county council for grant and it seems clear from reading the minute and recommendations as a whole that it was the potential for a financial contribution from the county council that had influenced the selection of section 69 of the 1925 Act as the potential acquisition route as distinct from an acquisition of the lands as "open spaces".

86. While the February 1938 document is the starting point, I do not consider that it is determinative of the question of the particular power which was in fact used in the later acquisitions in December 1938 and January 1939. The February 1938

recommendation for the use of section 69 of the 1925 Act was not a purchase resolution and, even as a recommendation that section 69 be used, it was accompanied by a further recommendation that "the Section under which land is to be acquired be determined on the merits of each particular case." Moreover, the actual conveyances for the acquisitions made in 1938-39 refer more generally to the Council's desire to acquire "for purposes mentioned in the Public Health Acts 1875 to 1925" without any specific reference to section 69 of the 1925 Act. There also seems to me to be a more fundamental reason why section 69 of the 1925 Act could not have been the specific acquisition power which was utilised in 1938-39 because section 69 of the 1925 Act had by then been repealed by section 11(2) of, and the Schedule to, the Physical Training and Recreation Act 1937 (which received royal assent on 13th July 1937 and had no specific commencement provision) ("the 1937 Act"). It appears that this may not have been appreciated at the time of the February 1938 meeting of the Recreation Grounds and Open Spaces Committee. The replacement provision in the 1937 Act for section 69(1) of the 1925 Act was section 4(1) which provided power for a local authority, inter alia, to acquire, lay out and maintain lands for the purpose of playing fields. There is no reference to section 4(1) of the 1937 Act in the 1938-39 conveyances or in the Terrier.

87. While the February 1938 recommendation for the use of section 69 of the 1925 Act is not determinative of the question of the particular power which was used for the 1938-39 acquisitions, the recommendation does show that the Council was clearly contemplating the acquisitions for the purposes of general public recreation. It could hardly have been otherwise given that the matter was before the Recreation Grounds and Open Spaces Committee but it is worthy of note that section 69(1) of the 1925 Act as referred to in the recommendation specifically mentions not just cricket and football but also *"other games and recreations"*. It is also to be remembered that, had it not been for the prospect of a financial contribution from the county council, it appears that the recommendation would not have been for the use of section 69 of the 1925 Act but one for the acquisition of the lands as "open spaces". As it is, the notion that the acquisitions were for "open space" purposes returned to the picture in connection with the 1938-39 acquisitions in that each of the plans in the series of conveyances at this point was headed "Proposed Open Space Laindon". The Terrier entries which correspond to these conveyances also

each record the "purpose" of the acquisitions as "Pound Lane Public Open Space". These references to "open space" and "public open space" confirm, and I so find, that the acquisitions in 1938-1939 were for the purposes of general public recreation. The connection between open space and recreation is apparent from the definition of "open space" in section 20 of the 1906 Act, which is *"any land, whether inclosed or not, on which there are no buildings or which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which … is used for the purposes of recreation".* [Emphasis added].

88. What then would have been the specific statutory power under which the 1938-1939 acquisitions took place? I agree with Mr Alesbury that, notwithstanding the references to "open space" in the conveyance plans and to "public open space" in the Terrier, the specific statutory acquisition power is not to be located in the 1906 Act. This is because the 1906 Act is not mentioned in the 1938-1939 conveyances. Those conveyances refer to the Public Health Acts 1875 to 1925 as does the Terrier. The specific statutory power is therefore to be found in the Public Health Acts 1875 to 1925. If section 69 of the 1925 Act is discounted (as I have done) then I agree with Mr Alesbury that the proper and obvious inference, in circumstances such as the present where land is acquired for the purposes of general public recreation, is that the acquisitions would have taken place under section 164 of the 1875 Act. I so find. There is, indeed, no other obvious candidate acquisition power in the Public Health Acts 1875 to 1925. Section 164 of the 1875 Act provides a power to *"purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds*".[34] I consider that this power is apt for the provision of a public recreation ground. Section 164 also confers a byelaw making power.

89. Turning to the byelaws which were made in this case, the 1979 Byelaws do not take matters any further forward in terms of considering the statutory acquisition/holding power applicable to the Application Land because the Application Land was not included as one of the pleasure grounds regulated by those byelaws. The Application Land is included in the 1997 Byelaws, identified in the Schedule thereto as "Pound Lane Recreation Ground, Laindon". I have already mentioned in

paragraph 49 above that the 1997 Byelaws are stated to be made under section 164 of the 1875 Act, section 15 of the 1906 Act and sections 12 and 15 of the 1906 Act "with respect to pleasure grounds and open spaces". The 1997 Byelaws do not categorise the pleasure grounds and open spaces to which they apply by reference to the particular byelaw making power applicable thereto. However, the 1997 Byelaws necessarily show that, when they were made, the Council must have considered that the Application Land was either a pleasure ground or an open space and that it attracted a byelaw making power under either section 164 of the 1875 Act or the 1906 Act. This is entirely consistent with my finding that so much of the Application Land as is comprised in the 1938-39 acquisitions (i.e., the vast majority of the Application Land) was acquired under section 164 of the 1875 Act.

90. I only need to add in respect of that part of the Application Land which was comprised in the 1938-39 acquisitions that I find that it continued since acquisition to be held under section 164 of the 1875 Act and that it was made available to the public thereunder from at least the 1960s[35] until it was appropriated for planning purposes on 25th June 2010.

91. I turn next to consider that small part of the Application Land in its south east corner which formed part of the land which was acquired in 1952. The evidence in respect of the 1952 acquisition (see paragraphs 42 and 43 above) is that it was for the purpose of housing under the 1936 Act and I so find. What then was the statutory power which allowed part of the land acquired for the purpose of housing to come to be part of a recreation ground? There are two candidate powers in the 1936 Act. First, there is section 79(1) (a) which provided that *"[w]here a local authority have acquired or appropriated any land for the purposes of this Part of this Act then without prejudice to any of their other powers under this Act the authority may (a) lay out and construct public streets or roads and open spaces on the land."* The equivalent provision in the Housing Act 1957 was section 107 and, in the Housing Act 1985, section 13. Secondly, there is section 80(1) which provided that *"[t]he powers of a local authority under this Part of this Act to provide housing accommodation, shall include a power to provide and maintain*

[34] Section 164 originally applied to urban authorities. Billericay was an Urban District Council.

with the consent of the Minister and, if desired, jointly with any other person, in connection with any such housing accommodation, any building adapted for use as a shop, any recreation grounds or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided." The equivalent provision in the Housing Act 1957 was section 93(1) and, in the Housing Act 1985, section 13. Mr Alesbury relied on section 80(1) of the 1936 Act.

92. That part of the Application Land which was part of the 1952 acquisition could therefore have been laid out as open space under section 79(1)(a) or provided as a recreation ground under section 80(1) of the 1936 Act. It is to be noted that the exercise of the power under section 80(1) required ministerial consent but that the exercise of the power under section 79(1)(a) did not. There is no note on the Terrier extract in relation to the 1952 acquisition of any ministerial consent ever having been obtained. By contrast, some of the other extracts from the Terrier relating to the 1938-39 acquisitions do note ministry consents in the context of appropriation of some of the land so acquired (presumably from the purpose of "Pound Lane Public Open Space" to housing). There is therefore some evidence to suggest that ministry consents were recorded in the Terrier. In circumstances where there is no evidence of the ministerial consent necessary for one power to have been used (and some evidence that ministry consents, once obtained, were noted) but another power was available which would provide an adequate explanation for what was done without any requirement for such consent, I consider that the inference to be drawn as to which power was used should be that it was the latter power. I thus infer, and on the basis of that inference find, that the statutory power used in connection with that part of the Application Land which was part of the 1952 acquisition was the power in section 79(1)(a) of the 1936 Act to lay out open space. Thereafter, so I find, the land was so held as open space and made available to the public from at least the 1960s until it was appropriated for planning purposes on 25th June 2010. No issue of appropriation of the land acquired in 1952 from housing purposes to open space purposes arises because the power in section 79(1)(a) of the 1936 Act was to lay out open space.

[35] A date which I take from Mr Topsfield's evidence which I accept on this point.

(ii) Effect of conclusions on land acquisition/holding power on use "as of right"

93. I turn next to consider the effect of my conclusions above on the issue of whether use of the Application Land has been "as of right". In considering this issue I deal first with the vast majority of the Application Land which formed part of the 1938-39 acquisitions. I deal secondly with the small part of the Application Land which was part of the 1952 acquisition.

94. I consider that use of the vast majority of the Application Land cannot have been, and was not, "as of right" at any relevant point before the appropriation for planning purposes on 25th June 2010.

95. There is well-established law that the public have a right to the use of land which a local authority has acquired and made available to the public under section 164 of the 1875 Act. *Hall v Beckenham Corporation*[36] concerned a failed action in nuisance against a local authority in respect of the flying of noisy model aircraft in a recreation ground which had been acquired under section 164 of the 1875 Act. In giving judgment for the defendant authority Finnemore J stated that he thought *"that the corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws."*[37]

96. In *Blake v Hendon Corporation*[38] the Court of Appeal dealt with the question of whether land acquired under section 164 of the 1875 Act, laid out as a public park and then opened to the public, was exempt from rating. In deciding that it was exempt the Court of Appeal applied the principle that the defendant authority was

[36] [1949] 1 KB 716.
[37] At 728.
[38] [1962] 1 QB 283.

not in rateable occupation because it was merely custodian and trustee of the park for the benefit of the public. In giving the judgment of the court Devlin LJ spoke in terms of *"the public right of free and unrestricted use"* of the land which he compared to *"the enjoyment of rights similar to those which they enjoy over the highway."*[39]

97. Section 164 of the 1875 Act does not in itself contain any statutory trust for public enjoyment but the position established in case law has gained later statutory recognition in sections 122(2B) and 123(2B) of the Local Government Act 1972 ("the 1972 Act") dealing respectively with the effect of appropriation and disposal of open space land under section 122(2A) and 123(2A). Sections 122(2B) and 123(2B) provide that where land is held for the purposes of section 164 of the 1875 Act the appropriation or disposal frees the land *"from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164"*.

98. The next question is how the law set out in the preceding paragraphs bears on the question of use "as of right" for the purposes of the 2006 Act. The general issue of the relationship between land provided by a local authority for the purposes of public recreation and the requirement that qualifying use for the purposes of the registration of a new green must be "as of right" was first explored in a series of dicta in *Beresford v Sunderland City Council*[40] which, although dicta and although not specifically mentioning section 164 of the 1875 Act, are of the highest persuasive force. More recently, the decision of the Court of Appeal in *Barkas v North Yorkshire County Council and Scarborough Borough Council*[41] establishes beyond doubt that use by the public for lawful sports and pastimes of land provided under section 164 of the 1875 Act is "by right" and not "as of right".

99. In *Beresford,* Lord Bingham stated that it was *"plain that 'as of right' does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired*

[39] At 299.
[40] [2003] UKHL 60.

one by user for a stipulated period."[42] He went on to explain that the concern of the House of Lords had been to explore the possibility that "*the local inhabitants might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not 'as of right' but pursuant to a statutory right to do so"* because *"[s]uch use would be inconsistent with use as of right."*[43]

100. Lord Scott dealt specifically with the 1906 Act, which is not engaged in the present case, but his remarks are nevertheless of more general relevance. He said that he thought that it was accepted that, if the council in that case had acquired the land in question *"under the 1906 Act"*, then *"the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use 'as of right'"*.[44]

101. For his part, Lord Roger recognised that, if any local authority statute had conferred on local inhabitants a right to use the land in question, the result would be *"that their use would be 'of right', as opposed to being 'as of right'"*.[45]

102. The most extensive treatment of matters was provided by Lord Walker. In paragraph 86 he stated that *"[t]he city council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the city council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in Hall v Beckenham Corpn [1949] 1 KB 716, 728, which was concerned with a claim in nuisance*

[41] [2012] EWCA Civ 1373. At the time of the inquiry only the first instance decision - [2011] EWHC 3653 (Admin) – was available. The Court of Appeal dismissed the appeal.
[42] At paragraph 3.
[43] At paragraph 9.
[44] At paragraph 30.
[45] At paragraph 62.

against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions."

103. In paragraph 87 Lord Walker made additional observations which are relevant for present purposes. He there said that, after the approach reflected in his remarks above had been suggested, "*there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."*[46]

104. In *Barkas* the Court of Appeal considered that the speeches of their Lordships in *Beresford* established the following propositions:

(a) that there is a distinction between a use of land "by right" and a use of land "as of right";

(b) that if a statute properly construed confers a right on the public to use land for recreational purposes, the public's use of that land will be "by right" and not "as of right";

(c) that section 10 of the 1906 Act is an example of land which is provided by a local authority as open space which the public use for recreational purposes "by right".[47]

[46] For the sake of completeness it is right to record that, in paragraph 88, Lord Walker also stated that the situations he had been considering *"would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space."*

[47] At paragraph 26.

105. The Court of Appeal further considered, with particular reference to Lord Walker's speech in *Beresford*, that he had regarded the notion of appropriation for the purpose of public recreation as being of critical importance.[48] Delivering the judgment of the court, Sullivan LJ continued as follows: *"[w]hile they are not binding (see paragraph 88 of his opinion) Lord Walker's observations are highly persuasive, and I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment. Mr Edwards made it clear that it was no part of his submissions that Lord Walker was wrong in not distinguishing between land which is held on a statutory trust under section 10 and land which has been appropriated for the purpose of public recreation. Land which is held under section 164 of the 1875 Act for the purpose of being used as public walks or pleasure grounds is, in my view, the paradigm of land which has been appropriated for public recreation. There is no suggestion that Lord Walker was using the word 'appropriated' in the narrow sense of appropriated for the purpose of public recreation under section 122 of the 1972 Act from some other statutory purpose. There is no practical distinction between land which is initially acquired for open space purposes and land which has been appropriated for open space purposes from some other use. Accordingly, I can see no basis for distinguishing between open space that is provided under section 10 of the 1906 Act and open space that is provided under section 164 of the 1875 Act. In both cases the public's use of that land for lawful sports and pastimes will be by right, and not as of right*."

106. Sullivan LJ also said *"local inhabitants can fairly be said to have a statutory right to use land which has been 'appropriated' for lawful sports and pastimes because the local authority, having exercised its statutory powers to make the land available to the public for that purpose, is under a public law duty to use the land for that purpose until such time as it is formally appropriated to some other statutory purpose."*[49]

107. I conclude therefore that use by the public for recreation of land made available to them after its acquisition by a local authority under section 164 of the

[48] At paragraph 33.

1875 Act is not use "as of right". It is use which is pursuant to a statutory right or use which is "of right" or "by right". Use in the present case has not therefore been "as of right" at any relevant point before the appropriation for planning purposes on 25th June 2010.

108. I turn next to deal with that small part of the Application Land which formed part of the 1952 acquisition. I consider that use of this part of the Application Land has also not been "as of right". In *Barkas* the Court of Appeal held that the position when a recreation ground was provided under section 80 of the 1936 Act was no different from the position when land was provided for recreational purposes under section 10 of the 1906 Act or section 164 of the 1875 Act. In such a case there was appropriation for the purpose of public recreation and use of the ground by the public for lawful sports and pastimes was therefore "by right" and not "as of right".[50] For my part, I cannot see why the position should differ when, as I have found here, the Council acquired the parcel of land in question under the 1936 Act and laid it out as open space under section 79(1)(a) of that act.

109. The 1936 Act does not define "open space" and does not therefore in terms embody the 1906 Act definition which (see paragraph 87 above) incorporates use for the purposes of recreation. Nevertheless it would seem to me that it would be odd if the power in section 79(1)(a) was not to be construed as a power to lay out "public" open space. The word "public" appears at the beginning of section 79(1)(a) before "streets or roads" and I would interpret the word "public" to govern both "streets or roads" and "open space". Were it otherwise the section would curiously be dealing with both public provision and non-public provision together. If my interpretation is correct, it seems to me that it would sensibly follow that, while provision of streets or roads for the public would be for a use of passage, the provision of open space for the public would be for their recreational use just as much as recreational use forms part of the definition of open space for the purposes

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[49] At paragraph 42.

[50] At paragraphs 37, 42 and 44 in particular. The Court of Appeal (at paragraph 41) left open as "unclear" the question of whether trespass was a necessary characteristic of use "as of right". The approach of Lord Walker in *Beresford* which focuses (in paragraphs 86 and 87 of his speech) on trespassory use is to be contrasted with the remark of Lord Scott (in paragraph 48) where he said that the users in that case were certainly not trespassers on the land in question, apparently on the basis of an implied consent to be there, but he nevertheless held that use was "as of right" because there was no sign that the permission was intended to be temporary or revocable (paragraph 49).

of the 1906 Act. There has thus been an appropriation for the purpose of public recreation in the sense envisaged in *Barkas*. I have considered the possible argument that construing section 79(1)(a) in this way might allow a local authority to do, in effect, what it could not do under section 80, that is, provide and maintain a recreation ground without the necessity for ministerial consent and the minister's making of a judgment of "beneficial purpose" as required by that section. I think that the answer to any such argument would be that section 80 contemplates the more formal provision of a recreation ground rather than simply laying out open space under section 79(1)(a) albeit that open space so laid out can be used by the public for recreational purposes.

110. I thus conclude overall that no part of the Application Land was used "as of right" for any part of the relevant period before the appropriation of the Application Land for planning purposes on 25th June 2010. Nothing in the submissions made on behalf of the Applicant deflects me from such a conclusion.

(iii)The relevance of the 1997 Byelaws to use "as of right"

111. The next question I deal with is how the 1997 Byelaws fit into the picture in terms of their relevance to the issue of use "as of right". I have already made the point in paragraph 89 above that the byelaw making powers identified in the 1997 document were entirely consistent with my finding that so much of the Application Land as is comprised in the 1938-39 acquisitions (i.e., the vast majority of the Application Land) was acquired under section 164 of the 1875 Act. The issue I turn to at this stage is that highlighted in the submissions made on behalf of the Applicant that byelaw notices have never been displayed at the Application Land.

112. I find as a fact that byelaw notices have, indeed, never been displayed at the Application Land. I have received direct evidence to this effect from the Applicant's witnesses and no evidence has been adduced by the Council that byelaw notices ever were displayed.

113. As a matter of law I consider that it is to be accepted that communication of the existence of byelaws would be necessary if the case against use "as of right"

were to be put on the basis of an implied, revocable permission. In *Newhaven Port and Properties* Ouseley J said that *"[t]he very existence of bye-laws communicated in some way, would have shown that the recreational use was by implied, revocable permission."*[51] [My emphasis]. However, that is not the case which is made by the Council here against use "as of right". As Mr Alesbury put it, the Council did not argue that, because it put byelaws notices up, it gave people permission to use the Application Land. The point was that the status of the Application Land in fact gave people the right to be there. In this connection Mr Alesbury relied on a further passage in the judgment of Ouseley J in *Newhaven Port and Properties* in which the judge said that *"[t]he status of the land, which attracts a regulatory power, may suffice to show that its use is by licence; this was so in the case of land held under the Open Spaces Act 1906."*[52] Thus it is the status of land in attracting a regulatory byelaw making power which is important for present purposes, not the question of whether the byelaws were ever communicated. My finding of absence of communication of the byelaws does not therefore affect my conclusion that use has not been "as of right".

114. Before leaving the issue of the relationship between the byelaws and the question of use "as of right" I mention briefly Mr Alesbury's submission that the fact that some activities indulged in on the Application Land might have been in breach of the applicable byelaws was irrelevant. That submission was really, so it seems to me, made out of an abundance of caution. Use in breach of the byelaws did not really feature in the evidence and it did not appear to me to be part of the case made on behalf of the Applicant to argue that such use had occurred and that it was trespassory in nature such that it could found a claim for registration under the 2006 Act. Had such a contention featured, I agree with Mr Alesbury that it would have been defeated by what Ouseley J had to say on the matter in *Newhaven Port and Properties.* Ouseley J stated that *"[a]ny activities carried on in breach of the byelaws, whether the byelaws are enforced against them or not, are unlawful and have to be discounted".*[53] He also stated that *"[b]yelaws, albeit unannounced and unenforced, are relevant to a prior aspect on which the Inspector concluded in*

[51] At paragraph 96.
[52] At paragraph 85.
[53] At paragraph 93.

favour of Newhaven Port. If they had prohibited all the activities relied on by the inhabitants to establish their recreational user rights, there would have been no lawful sports and pastimes. The issue of user as of right would not even have been reached."[54] I consider that this provides clear guidance on the matter which should be followed.

Overall conclusion and recommendation

115. The Application cannot succeed because:

(a) the Applicant has failed to prove a qualifying neighbourhood or locality; or

(b) in the alternative, if (a) is wrong, the Applicant has failed to prove use by a significant number of the inhabitants of any qualifying neighbourhood or locality; and

(c) use of the Application Land could not have been, and was not, "as of right" at any relevant time before the appropriation of the Application Land for planning purposes on 25th June 2010.

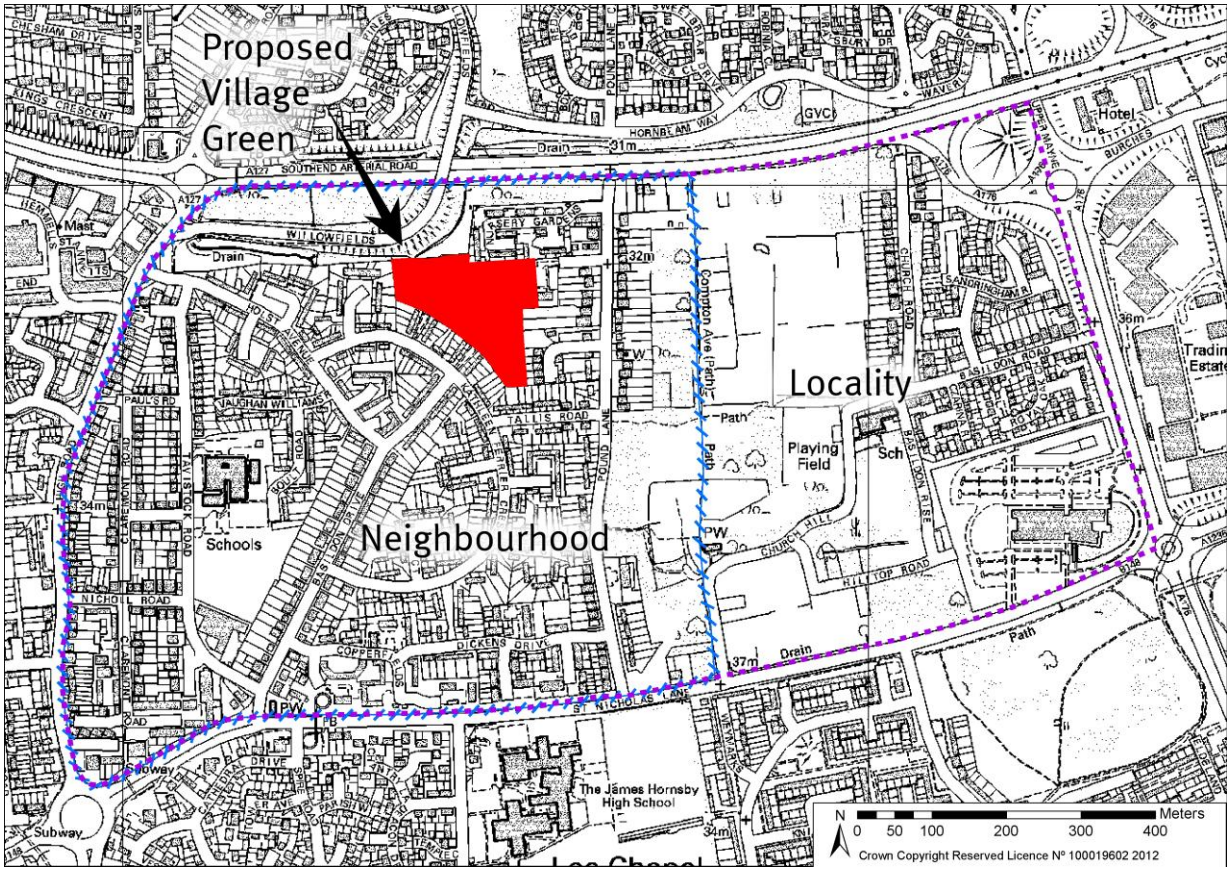
116. Accordingly, my recommendation to the Registration Authority is that the Application should be rejected.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
28th October 2012

[54] At paragraph 103.

Appendix 2


Proposed Village Green
Locality
Neighbourhood
Schools
Playing Field
The James Hornsby High School
Drain
Path
Meters
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AGENDA ITEM .....7a.....

DR/04/13

committee DEVELOPMENT & REGULATION

date 25 January 2013

ENFORCEMENT OF PLANNING CONTROL – INFORMATION ITEM

Enforcement update.

Report by Head of Environmental Planning

Enquiries to Suzanne Armstrong – Tel: 01245 437556

1. PURPOSE OF THE ITEM

To update members of enforcement matters for the period 01 October to 31 December 2012 (Quarterly Period 3).

2. DISCUSSION

A. Outstanding Cases

As at 31 December 2012 there are 19 outstanding cases. Appendix 1 shows the details of sites (11) where, after investigation, a breach of planning control is considered to have occurred.

B. Closed Cases

21 cases were resolved during Period 3 (01 October to 31 December 2012).

LOCAL MEMBER NOTIFICATION

Countywide

District	Site Address	Breach of Planning Control	Required Action	Remarks
Basildon BC	No formal cases			
Braintree DC	Dannatts Quarry, Hatfield Peverel	Non completion of restoration & deposit of waste	Cease waste importation and restore land	No current site activity, waste importation has ceased. Ground contamination investigations continue.
Brentwood BC	No formal cases			
Castle Point BC	No formal cases			
Chelmsford CC	Birkett Hall Farm, Woodham Ferrers	Deposit of waste / landraising	Cease waste importation and restore land	No current site activity, waste importation has ceased. Discussions continue with landowner on actions necessary to resolve this unauthorised development.
	Land adjacent to Cock Inn, Boreham	Use of land for concrete crushing	Cease importation of concrete (per se). TSN served requiring cessation.	TSN complied with. The land benefits from a District CLUED (1999) for soil screening. Site meeting January 2013. Unauthorised waste importation has ceased, only authorised materials coming in to the site. Meeting resolved issues relating to stockpiles, matter to be dealt with by the Operators. There has been an improvement in the appearance of the site since our previous visit. Further regular monitoring will be undertaken to ensure compliance
Colchester BC	Colchester Skip Hire, Wormingford	Deposit and storage of waste & formation of rubble track	2 enforcement notices served	Enforcement notices upheld by Planning Inspector on appeal, to clear waste & restore the land. At this time it is not considered expedient to take further enforcement action (requiring removal of the hard standing and track), subject to planning permission ref: APP/Z1585/A/11/2165340 being implemented. Should this permission not be implemented within the set time limit, further action will be considered.
Epping Forest DC	Land adjacent to Breach Barnes Caravan Park, Waltham Abbey	Deposit of waste / land raising	Cease waste importation	The deposited waste materials have been removed from the land. Currently only building materials are stored on the land. No further action required,
	Land adjacent to Sines Caravan Park, Waltham Abbey	Deposit of waste / land raising		There are no current works. PCN issued. Further action to be determined.
Harlow DC	No formal cases			
Maldon DC	No formal cases			
Rochford DC	Michelins Farm, Rayleigh	Deposit of waste / land raising	Enforcement notice served	Enforcement notice upheld by Planning Inspector. Removal of waste compliance date is 22 May 2013, and restoration of land by 22 July 2013.

	Lovedown Farm, Hockley	Deposit of waste / landraising	Cease waste importation	No current site activity, waste importation has ceased. WPA, EA, and Natural England are consulting on action required to be taken by the landowner.
Tendring DC	Lane Farm, Wix	Breach of planning condition (highway works)	Undertake required highway works	Operator relocating to Parkstone Quay, Harwich.
	Tip Top Recycling, Gorse Lane Industrial Estate, Clacton	Use of part of site for storage of metal for recycling	Apply for retrospective planning permission	13/8/12 - DC advise they received a retrospective application (Ref: 12/00840/FUL). Above application withdrawn and resubmitted to WPA.
Uttlesford DC	Armigers Farm, Thaxted	Deposit and storage of waste	Enforcement notice served, clear waste from land	No appeal was lodged. Compliance required by 25 August 2013.

APPENDIX 1

AGENDA ITEM .....7b.....

DR/05/13

Committee DEVELOPMENT & REGULATION

date 25th January 2013

INFORMATION ITEM
Applications, Enforcement and Appeals Statistics

Report by Head of Environmental Planning

Enquiries to Tim Simpson – tel: 01245 437031
or email: tim.simpson2@essex.gov.uk

1. PURPOSE OF THE ITEM

To update Members with relevant information on planning applications, appeals and enforcements, as at the end of the previous month, plus other background information as may be requested by Committee.

BACKGROUND INFORMATION

None.

Ref: P/DM/Tim Simpson/

MEMBER NOTIFICATION

Countywide.

SCHEDULE

Minerals and Waste Planning Applications

No. Pending at the end of previous month	**19**
No. Decisions issued in the month	**2**
No. Decisions issued this financial year	**43**
Overall % age in 13 weeks this financial year	**77%**

% age in 13 weeks this financial year (NI 157a criteria, Target 60%)	**77%**
Nº Delegated Decisions issued in the month	**0**
Nº Section 106 Agreements Pending	**2**
<u>County Council Applications</u>	
Nº. Pending at the end of previous month	**12**
Nº. Decisions issued in the month	**3**
Nº. Decisions issued this financial year	**31**
Nº of Major Applications determined (13 weeks allowed)	**0**
Nº of Major Applications determined within the 13 weeks allowed	**0**
Nº Delegated Decisions issued in the month	**3**
% age in 8 weeks this financial year (Target 70%)	**84%**
<u>All Applications</u>	
Nº. Delegated Decisions issued last month	**3**
Nº. Committee determined applications issued last month	**2**
Nº. of Submission of Details dealt with this financial year	**130**
Nº. of Submission of Details Pending	**149**
Nº. of referrals to Secretary of State under delegated powers	**2**
<u>Appeals</u>	
Nº. of appeals outstanding at end of last month	**3**
<u>Enforcement</u>	
Nº. of active cases at end of last quarter	**19**
Nº. of cases cleared last quarter	**21**

Nº. of enforcement notices issued last month	**0**
Nº. of breach of condition notices issued last month	**0**
Nº. of planning contravention notices issued last month	**0**
Nº. of Temporary Stop Notices Issued last month	**0**
Nº. of Stop Notices Issued last month	**0**